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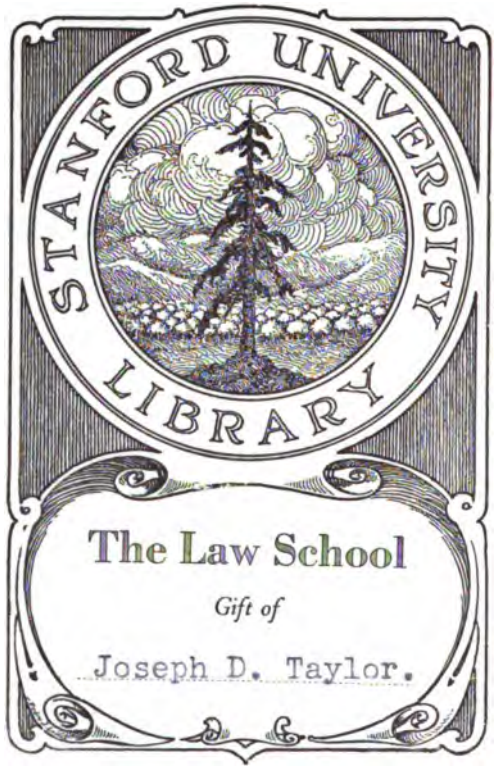

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H. E. Hackney

Sept 7, 1915

A SELECTION OF CASES

ON

THE LAW OF SURETYSHIP

BY

JAMES BARR AMES

BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY

CAMBRIDGE
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CASES ON SURETYSHIP.

CHAPTER I.

NATURE OF THE CONTRACT OF SURETYSHIP.

SECTION I.

Suretyship in the Form of a Collateral Undertaking, or Guaranty.

ROZER *v.* ROZER.

IN THE COMMON PLEAS, TRINITY TERM, 1681.

[*Reported in* 2 *Ventris*, 36.]

AN *Indebitatus Assumpsit pro parcell' Corii ad specialem instantiam & requisitionem* of the defendant, sold and delivered to J. S. *Et sic inde Indebitat' existens* the defendant promised to pay.

Upon *non assumpsit* pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment that there is no promise laid, and no reason to presume a promise, when 't is the very ground of the action, though after a verdict. And admitting there were a promise; yet it being collateral it did not make a debt, but should have been brought as an action upon the case.[1] Mo. 702, and Dyer, 230. And hereupon judgment was stayed. Though (as I hear) in the King Bench about two years since, between Danbey and Kent, they held such a case well enough after a verdict. *Quære.*

[1] Y. B. 27 Hen. VIII. 25–33, per Fitzjames, C. J. Hinson *v.* Burridge, Moo. 701; Cogan *v.* Green, 1 Roll. Ab. 594; Anon., 1 Vent. 293; Mires *v.* Sculthorpe, 2 Camp. 215; Rains *v.* Storry, 3 C. & P. 130, *Accord.*

Kent *v.* Derby, 1 Vent. 311; 3 Keb. 756 s. c. (overruled); Kansas Co. *v.* Smith, 36 Mo. Ap. 608, 622 (*semble*), *Contra.*

But if exclusive credit be given by A to B for goods delivered to C, B is liable in debt or *indebitatus assumpsit* for goods sold. Watson *v.* Porael, 158 Pa. 513. — ED.

JONES *v.* COOPER.

IN THE KING'S BENCH, NOVEMBER 25, 1774.

[*Reported in Cowper*, 227.]

THIS was an action for goods sold and delivered at the instance of the defendant. Plea, *non assumpsit*, and verdict for the defendant. Upon a rule to show cause why a new trial should not be granted, the case appeared from the report of MR. JUSTICE NARES, who tried the cause, to be shortly this: The defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one Smith, her son-in-law; in all of which she undertook to be answerable for the payment. These had been all punctually discharged. But the goods upon which the present question arose were delivered to Smith, in consequence of a parol order and a parol promise by the defendant in these words, "I will pay you, if Smith will not." — That the undertaking was before the delivery of the goods; but that Smith was entered as the debtor in the plaintiff's books.

Mr. Mansfield and *Mr. Buller*, in support of the rule. The single question is, Whether the promise which is the ground of the plaintiff's action is to be considered as a collateral promise within the Statute of Frauds; or whether it is not an original undertaking upon the credit of which the goods were supplied to Smith?

The words of the stat. 29 Car. 2, c. 3, are, "That no action shall be brought whereby to charge a person upon any special promise to answer for the debt or default of another, unless the agreement upon which such action is brought, shall be in writing." This is not an undertaking for the debt of another; but an original contract upon the confidence of which the debt first accrued: therefore not within the statute; and so it was held in Mawbrey *v.* Cunningham, Sittings after Hil. Term, 1773. There goods were delivered to A, at the request of B, who said he would see them paid for. LORD MANSFIELD held, that as the promise was before delivery of the goods, it was not within the statute, because at the time of the promise there was no debt at all.

Mr. Dunning, contra. The case cited was for goods sold at the defendant's request, and a promise by the defendant to pay for them. No doubt if goods be delivered to A, upon the request of B, and B promises to pay for them, they are goods sold to B. But in the present case, the defendant was to pay only in case Smith (to whom the goods were sent) did not pay for them; it is therefore a conditional promise. Smith was made debtor for them, and considered as such by the plaintiff, and therefore he should have used due diligence to recover against Smith before he had recourse to the defendant.

LORD MANSFIELD. The general distinction is a clear one, and upon that distinction the case which has been cited was determined. Where

the undertaking is before delivery, and there is a direction to deliver the goods, and "I will see them paid for," it is not within the Statute of Frauds.[1] But there may be a nicety where the undertaking is before delivery, and yet conditional as this is. It turns singly upon the undertaking being in case the other did not pay. We will look into it.

The next day LORD MANSFIELD delivered the unanimous opinion of the Court as follows: —

We are all of opinion upon the authority of the cases in the books, that the promise by the defendant in this case to pay, if Smith did not, is a collateral undertaking within the Statute of Frauds; and it is so clear that it would only be misspending time to go through the cases, or to say much about it.

Rule for a new trial discharged.[2]

[1] The opinion of the Court in Perley v. Spring, 12 Mass. 297, 299, to the same effect, was overruled in Cahill v. Bigelow, 18 Pick. 369, 371. See also Rogers v. Kneeland, 13 Wend. 114, 121; Matthews v. Milton, 4 Yerg. 576, 578; Mead v. Watson, 57 Vt. 426. — ED.

[2] Parsons v. Walker, 3 Doug. 14 n. (c.); Peckham v. Faria, 3 Doug. 13; Matson v. Wharam, 2 T. R. 80; Anderson v. Hayman, 1 H. Bl. 120; Keate v. Temple, 1 B. & P. 158; Boykins v. Dohlonde, 37 Ala. 577; Webb v. Hawkins Co., 101 Ala. 630; Harris v. Frank, 81 Cal. 280; Ruggles v. Gatton, 50 Ill. 412; Pettit v. Braden, 55 Ind. 201; Wills v. Ross, 77 Ind. 1; Langdon v. Richardson, 58 Iowa, 610; Blake v. Parlin, 22 Me. 395; Moses v. Norton, 36 Me. 113; Conolly v. Kettlewell, 1 Gill, 260; Norris v. Graham, 33 Md. 56; Cahill v. Bigelow, 18 Pick. 369; Hill v. Raymond, 3 All. 540; Swift v. Pierce, 13 All. 136; Gill v. Herrick, 111 Mass. 501; Barrett v. McHugh, 128 Mass. 165; Bugbee v. Kendricken, 130 Mass. 437; Welch v. Marvin, 36 Mich. 59; Hagadorn v. Stronach Co., 81 Mich. 56; Cole v. Hutchinson, 34 Minn. 410; Maurin v. Fogelberg, 37 Minn. 23; Walker v. Richards, 39 N. H. 259; Rothman v. Fix, 25 Mo. Ap. 571; Price v. Chicago Co., 40 Mo. Ap. 189; Osborn v. Emery, 51 Mo. Ap. 408; Gill v. Reed, 55 Mo. Ap. 246; Cowdin v. Gottgetreu, 55 N. Y. 650; Allen v. Scarff, 1 Hilt. 209; Read v. Ladd, 1 Edm. S. C. 100; Brown v. Bradshaw, 1 Duer, 199; Leland v. Creyon, 1 McC. 100; Taylor v. Drake, 4 Strob. 431; Matthews v. Milton, 4 Yerg. 576; Mead v. Watson, 57 Vt. 426; Cutler v. Hinton, 6 Rand. 509; Ware v. Stephenson, 10 Leigh, 155, *Accord*.

In Peckham v. Faria, *supra*, Lord Mansfield said, p. 14: "Before the case of Jones v. Cooper I thought there was a solid distinction between an undertaking after credit given, and an original undertaking to pay, and that in the latter case the surety, being the object of the confidence, was not within the statute; but in Jones v. Cooper the Court was of opinion, that whenever a man is to be called upon, only in the second instance, he is within the statute; otherwise, where he to be called upon in the first instance."

In accordance with this distinction, the Statute of Frauds was held to be inapplicable in the following cases where credit was given by the seller to the defendant alone, although the goods were delivered to another person. Croft v. Smallwood, 1 Esp. 121; Rhodes v. Leeds, 3 St. & P. 212; Faires v. Lodana, 10 Ala. 50; Sanford v. Howard, 29 Ala. 684; Clark v. Jones, 87 Ala. 474; Loomis v. Smith, 17 Conn. 115; Baldwin v. Hiers, 73 Ga. 739; Williams v. Corbet, 28 Ill. 262; Hughes v. Atkins, 41 Ill. 213; Owen v. Stevens, 78 Ill. 462; Hartley v. Varner, 88 Ill. 561 (but *semble* the rule was misapplied in this case. See also Browne, St. Fr. [5 ed.] 252); Johnson v. Hoover, 72 Ind. 395; Board v. Cincinnati Co., 128 Ind. 240; Collins v. Stanfield, 139 Ind. 184; Benbow v. Soothsmith, 76 Iowa, 151; Calahan v. Ward, 45 Kas. 545; Elder v. Warfield, 7 Har. & J. 397; Walker v. Hill, 119 Mass. 249; Larson v. Jensen, 53 Mich. 427; Morris v. Osterhout, 55 Mich. 262; Hake v. Solomon, 62 Mich. 377; Winslow v. Dakota Co., 32 Minn. 237; Amort v. Christofferson, 57 Minn. 234; Wallace v. Wortham,

JOHN GIBBS AND ANOTHER v. IRA BLANCHARD.

IN THE SUPREME COURT, MICHIGAN, APRIL TERM, 1867.

[*Reported in* 15 *Michigan*, 292.]

CHRISTIANCY, J.[1] The main question in this case is whether the promise of Gibbs (one of the defendants below) comes within the second clause of the second section of our Statute of Frauds, as a "special promise to answer for the debt, default, or misdoings" of Daily, the other defendant.

The declaration contains a special count upon the contract, and the common counts for goods sold and delivered. The special count sets forth that "in consideration that said plaintiff agreed to sell to the said Daily a certain horse which the plaintiff then and there had, of the value of sixty dollars, [the defendants?] undertook and promised the said plaintiff to make sign, and deliver their promissory note to said plaintiff or bearer in the sum of sixty dollars for the purchase price of said horse, which said promissory note was to be payable thereafter, in six months from date." It further alleges that the plaintiff, relying upon said promise of said defendants, and in consideration thereof, did sell and deliver the horse to said John Daily for the price of sixty dollars. The breach alleges the failure and refusal to make and deliver the note, as well as the refusal to pay the money.

It was clear, from the evidence, that the horse was bought for the benefit of, and delivered to Daily, and that the plaintiff would not have sold the horse on the credit of Daily alone. But upon the question whether Daily and Gibbs were to give a joint note, or whether the latter was only to indorse the note of the former, or to become his guarantor, the evidence was conflicting.

There was evidence from which the jury might have found a joint promise, or in other words a promise by both to execute and deliver to the plaintiff a joint note for the price: and from the circumstances and subsequent acts of the parties the jury might have been authorized to find that the note was to be made payable in six months; though they might also have found that no particular time was mentioned or expressly agreed upon for which the note was to run.

The evidence tending to show that the promise was joint, or that a joint note was to be given, was substantially this: Gibbs and Daily

25 Miss. 119; Waters *v.* Shafer, 25 Neb. 225; Barras *v.* Pomeroy Co., 38 Neb. 311; Nesbit *v.* Pioche Works (Nevada, 1894), 38 Pac. R. 670; Walker *v.* Richards, 41 N. H. 388; Chase *v.* Day, 17 Johns. 114; Bayles *v.* Wallace, 56 Hun, 428; Maddock *v.* Root, 72 Hun, 98; Post *v.* Geoghegan, 5 Daly, 216; Fitzgerald *v.* Tiffany, 9 N. Y. M. R. 408; Mackey *v.* Smith, 21 Oreg. 598; Jefferson Co. *v.* Slagle, 66 Pa. 202; Merriman *v.* McManus, 102 Pa. 102; Mease *v.* Wagner, 1 McC. 395; Hazen *v.* Beard, 4 Sneed, 48; Sinclair *v.* Richardson, 12 Vt. 33; Whitman *v.* Bryant, 49 Vt. 512; Champion *v.* Doty, 31 Wis. 190; West *v.* O'Hara, 55 Wis. 645; Treat Co. *v.* Warner, 60 Wis. 183.— ED.

[1] Only the opinion of the Court in regard to the Statute of Frauds is given. — ED.

called upon the plaintiff together, and Gibbs asked plaintiff if he wanted to sell his mare. Plaintiff said he did. Gibbs inquired the price, and being told sixty dollars, wanted to know if plaintiff would take Daily's note if he, Gibbs, would sign it and see it paid; to this plaintiff assented. The mare not being present, and Gibbs, being anxious to get home, said, Daily might go with plaintiff and see the mare, and if the mare suited him he might fetch her back with him and draw up a note and Daily might sign it, and the first time he, Gibbs, went to town he would sign it. The mare was delivered to Daily, who signed a note for it at six months, which was afterwards indorsed by Gibbs on Sunday. This note was produced on the trial and tendered back to defendants.

The Court charged the jury that "if it was the understanding of the parties that Daily was the purchaser, and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as indorser, the plaintiff must fail. If, however, the understanding of the parties was at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for the price, then both are purchasers, and the case is not within the Statute of Frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the Statute of Frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Though the question is one requiring some accuracy of discrimination, I have come to the conclusion, after a careful examination of the authorities, that the charge of the Court was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness.

No question can arise as to the sufficiency of the consideration for the undertaking of Gibbs, whether original or collateral, within or without the statute. Without his promise, the plaintiff would not have parted with his property. The consideration, therefore, is equally as good in law as a sale of the horse to him alone would have been for his sole promise to pay the price.

The plain, ordinary meaning of the language used in this clause of the statute would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promisor and promisee, is origi-

nal or primary. If there be no such original or primary undertaking or liability of another party, there is nothing to which the promise in question can be secondary or collateral, and the promise is, therefore, original in its nature, and not within the statute. In other words, the statute applies only to promises which are in the nature of guarantees for some original or primary obligations to be performed by another. This has been settled by a remarkably uniform course of decision since the passage of the statute, — 29 Car. 2, c. 3, § 4, — which does not essentially differ from our own and those of most of the States of the Union. So numerous and so uniform have been the decisions upon this point, that it would savor of affectation to cite them. They will be found cited in most of the elementary treatises. See Brown on Stat. Frauds, c. 10; Chitty on Cont. p. 442 *et seq.*; 2 Pars. on Cont. 4th ed. 301. And though the terms *original* and *collateral* have been criticised, yet when used, the one to mark the obligation of the principal debtor, the other that of the person who undertakes to answer for such debt, they are strictly correct, and give the true view of this clause of the statute. Mallory *v.* Gillett; Brown on Stat. Frauds, c. 10, § 192.

As a result of this principle, that one must be held originally or primarily, and the other only collaterally, or in default of the former, it follows that the statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising, and not a joint liability with the party in whose behalf it is made. For if one be bound in the first instance and at all events, and the other only contingently, or on default of the first, the liability could not be joint. On the other hand, if the promise or the obligation of the two be joint, as between them, on the one side and the promisee on the other, then neither is collateral to the other; and such joint promise is original as to both. Hence it has been held in England that an agreement to convert a separate into a joint debt is not within the statute; the effect being to create a new debt, in consideration of the former being extinguished. *Ex parte* Lane;[1] Brown on Stat. of Frauds, 198.

Where the question arises (as it has in almost all the cases), as one of the several liability of the party promising in behalf of another (as for the price of goods sold to another), the true rule undoubtedly is, that if the latter (to whom the goods are sold) be liable at all, then the promise of the former is collateral, and must be in writing; because, from the very nature of such a case, the party to whom the goods are sold, and in whose behalf the promise is made, is the principal debtor; and because it would be manifestly unreasonable to hold that both were in such cases severally liable as principals, as upon several original undertakings at the same moment. See Hetfield *et al. v.* Dow;[2] Dixon *v.* Frazee.[3] And this rule applies equally when the promise is made in reference to a pre-existing liability of another, if the plaintiff in accepting

[1] 1 De Gex, 800. [2] 3 Dutcher, 440. [3] 1 E. D. Smith, 32.

the promise does not release the principal. In reference to all such cases the authorities may be said to be entirely uniform. But the rule thus established as to cases where the question is one of the several liability of the party making the special promise, can, I think, have no application to the question of a joint liability upon a joint promise of the two. The only intimation to the contrary which I have seen is to be found in a *dictum* of Judge Catron in Matthews *v.* Milton,[1] a case in which no such question was involved, there being no evidence tending to show a joint promise. To say that when the party originally owing the debt, or for whom goods are purchased and to whom they are delivered, is liable at all, no other person can be held severally liable unless the promise be in writing, is merely saying that such promise is collateral, and therefore within the statute. But to say that they cannot both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is not competent for both to become original promisors, as between them and the promisee, unless both are under an equal obligation, as between themselves, for the ultimate payment of the debt. Such a proposition, it seems to me, cannot be maintained either upon principle or authority. Such an objection to a joint promise seems rather to have reference to some supposed defect of consideration (a question entirely distinct from the statute) than to the promise. And, if the party promising jointly with another to whom goods are furnished, cannot be bound jointly with the latter, because, as between the two promisors, he, not having received the goods, is under no obligation to pay; then the same reason ought to operate with still greater force against his several promise to pay the whole price of goods received by the other. But the law in the latter case is well settled the other way.

It was very correctly remarked by Whelply, J., in Hetfield *et al. v.* Dow, above cited, that, "to settle the rights of promisors *inter sese*, to ascertain as between them who is to pay the debt ultimately, is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors ultimately may be bound to pay the debt is, as to the promisee, the principal debtor. That does not concern him." This view, it seems to me, rests upon sound reasons, — reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or delivered to another, the vendor has a right conclusively to presume that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise, would operate as a fraud upon the vendor.

[1] 4 Yerg. 576

The question of a joint promise appears to have been seldom raised for adjudication in connection with the Statute of Frauds; but the following cases fully sustain the proposition that a joint promise of two, whether to pay the pre-existing debt of one of them, or a debt contracted at the time for his benefit (as for goods bought for and delivered to the one), does not come within the statute, but is an original promise, as between them and the promisee, and valid without writing. *Ex parte* Lane;[1] Wainwright *v.* Straw;[2] Stone *v.* Walker;[3] and Hetfield *v.* Dow.[4] See also by analogy, Batson *v.* King.[5] The same doctrine is laid down by Mr. Brown in his able treatise on the Statute of Frauds. Ch. 10, § 197.

It is true that in Wainwright *v.* Straw, which most resembles the present case, the decision is placed in part upon the ground that the sale was made to both. The facts were that Straw and Cunningham both went to plaintiff's store and said they wished to buy a stove for Straw, but that both would be responsible. Now I can see no difference in legal effect between the case where A and B say to a merchant, "We want to buy a stove for B, and both of us will be responsible;" and the case where A says, "B wishes to purchase a stove, but we will both be responsible." Substantially, the transaction is the same; in both cases alike it is a sale for the benefit of the one on the joint credit of the two, and the real question in both cases is, whether the credit was given to both jointly. I do not think the Court, in Wainwright *v.* Straw, based their decision upon the narrow and merely verbal ground of the use of the first person plural, showing merely who wanted the stove, but upon the broad ground above stated, that it was sold upon their joint credit. And in all such cases where the sale is upon the joint credit and promise of the defendants, though the property is purchased for, and delivered to but one of them, I think the legal effect of the transaction constitutes, as between them and the vendor, a sale to the two jointly. The sale as between the vendor and the vendee, is to the party or parties to whom the credit is given for the price, without reference to the question for whose use it is purchased, or who, as between the promisors, is to be its owner when bought.[6]

This brings us to another point in the case. The sale (if upon the joint credit and promise of the defendants) was a joint sale to both, as between them and the plaintiff. But in the special count of the declaration it is alleged as a sale to Daily alone. The plaintiff cannot therefore recover upon the special count.

But upon the count for goods sold and delivered, the sale having

[1] 1 De Gex, 300. [2] 15 Vt. 215. [3] 13 Gray, 613.
[4] 3 Dutcher, 440. [5] 4 H. & N. 739.

[6] Boyce *v.* Murphy, 91 Ind. 1; Swift *v.* Pierce, 13 All. 136 (*semble*); Rothman *v.* Fix, 25 Mo. Ap. 571 (*semble*); Hetfield *v.* Dow, 27 N. J. 440 (*semble*); Wainwright *v.* Straw, 15 Vt. 215; Eddy *v.* Davidson, 42 Vt. 56 (*semble*), *Accord.*

See Boykins *v.* Dohlonde, Ala. Sel. Cas. 502, 507–8; Matthews *v.* Milton, 4 Yerg. 576. — Ed.

been made to both, the plaintiff would be entitled to recover, if the facts be such as would warrant a recovery upon a sale made for the joint benefit of, and the property delivered to both.

I think there was no error in the charge or proceedings of the Court below, and that the judgment should be affirmed, with costs.

COOLEY, J., and CAMPBELL, J.,[1] concurred.

HART *v.* LONGFIELD.

IN THE QUEEN'S BENCH, HILARY TERM, 1703.

[*Reported in 7 Modern Reports*, 148.]

INDEBITATUS ASSUMPSIT. One of the counts, to which there was a demurrer, was this: The plaintiff declared that whereas such a day and year the defendant was indebted to him in such a sum for nourishing Edward Longfield, at the request and instance of the defendant, and that he, the defendant, promised to pay him.

The first exception was, That an *indebitatus assumpsit* did not lie in the case; and to prove this the case of Sands *v.* Trevilian[2] was cited, where A desired B to be attorney for J. S. and undertook to pay him his fees, and such fees as he should give to counsel; and it was adjudged, that an *indebitatus* would not lie against A.[3] And also the cases of Hinson *v.* Burridge,[4] and Rozer *v.* Rozer.

[1] The opinion of CAMPBELL, J., is omitted.

[2] Cro. Car. 107, 194. — But see Ambrose *v.* Rowe, 2 Show. 421.

[3] The plaintiff had obtained judgment in the Common Pleas, but on a writ of error to the King's Bench, "All the Court conceived that no action of debt lies here, but an action upon the case only; for the retainer being for another man, and he being attorney for another man who agreed to that retainer, there is no cause of debt betwixt him who retained and the attorney, and no contract nor consideration to ground this action: and he who is so retained may well have debt for his fees wherein there cannot be any wager of law; but against the defendant, who is a stranger to the suit, and at whose request he took upon him to be attorney, debt lies not, as 27 Hen. VIII., pl. 24: and in the case of Rolls *v.* Germyn, Cro. El. 425, Moo. 366, it was so resolved. Whereupon it was adjudged that the first judgment should be reversed."

But in Harris *v.* Finch, Al. 6, Rolle, C. J., who had been of counsel for the plaintiff in Sands *v.* Trevilian, is reported as saying of that case that "the judgment was not reversed upon the roll, and his opinion was that the judgment was good." In Ambrose *v.* Rowe, 2 Show. 421, Skin. 47, s. c., Lord Jeffries, C. J., said, "that he thought Rolle's argument in that case of Sands *v.* Trevilian not to be answered." Rolle had argued that "there was a difference where one is retained generally for another with such a promise to pay his fees and as much as he should expend in the suit, there debt lies: but if I retain one to be attorney for another and promise if the other doth not pay, that I will pay, there if the party for whom the retainer is doth not pay, an action of the case lies against me upon my promise, and not an action of debt." In confirmation of this sound distinction see Woodhouse *v.* Bradford, 2 Roll. R. 76, Cro. Jac. 520; Sanborn *v.* Merrill, 41 Me. 467; Hodges *v.* Hall, 29 Vt. 209; Murphy *v.* Gates, 81 Wis. 370. — ED.

[4] Moor, 701.

HOLT, C. J. Cannot A be indebted to B for doing good to C? For if A should say to B, "Give such a quantity of goods to C upon my account, and I will pay you;" or, "Make J. S. a cart, and I will pay you for it;" surely an *indebitatus* will lie against A in that case. The sale properly is to him upon whose request it is given, and not to him to whom it is given: but an *indebitatus* will not lie for being an attorney to a third person, because in that case his being an attorney on record is what entitles him to debt; and therefore, if another promise to pay, yet he for whom he is an attorney on record is not discharged, and therefore the other cannot in that case be liable to an *indebitatus*. And in the case of the cloth put before, no action lies against him to whom it is delivered, but only against him upon whose request it is sold. *Judgment for plaintiff.*[1]

THE LADY SHANDOIS *v.* SIMSON.

IN THE QUEEN'S BENCH, TRINITY TERM, 1601.

[*Reported in* 1 *Croke, Elizabeth*, 880.]

ERROR of a judgment in the Common Pleas, where the plaintiff declared in debt for £256 upon several retainers to embroider divers gowns.

Secondly.[2] It was alleged that debt lies not in this case, but an *assumpsit* only; for here is not any contract betwixt them, nor *quid pro quo:* and therefore Nelson's Case, 28 Eliz., was cited, that where one retained Nelson to be attorney for another in such a suit, and agreed that he should have so much for his labor, he brought debt against him who retained him, and not against him for whom he was retained: and it was adjudged that it lay not, for it is not any contract between them; but an *assumpsit* lies only because he became at his request the other man's attorney. *Sed non allocatur:* for here the embroidering of the gown at her request is sufficient, and it is at his election to have debt or assumpsit;[3] as 37 Hen. 6, pl. 8; 3 Edw. 4, pl. 21; 7 Edw. 4, pl. 26; Dyer, 347 and 337; Wooton's Case.

[1] Bret *v.* J. S., Cro. El. 756; Stonehouse *v.* Bodvil, T. Ray. 67, 1 Keb. 439, s. c.; Jordan *v.* Tompkins, 2 Ld. Ray. 982; 6 Mod. 77, s. c.; Brown *v.* Harrell, 40 Ark. 429; McTighe *v.* Herman, 42 Ark. 285; Chicago Co. *v.* Liddell, 69 Ill. 639; Geelan *v.* Reid, 22 Ill. Ap. 165; Kernodle *v.* Caldwell, 46 Ind. 153; Lessenich *v.* Pettit (Iowa, 1894), 60 N. W. R. 192; Grant *v.* Wolf, 34 Minn. 32; Sinclair *v.* Bradley, 52 Mo. 180; Bushee *v.* Allen, 31 Vt. 631, *Accord.*

In Rawson *v.* Springsteen, 2 Th. & C. 416, A was not liable on his oral promise to pay for B's board, because credit was given to B also. — ED.

[2] Only so much of the case is given as relates to the second error. — ED.

[3] Y. B. 37 H. VI. 9-18; Harris *v.* Finch, Al. 6; Gordon *v.* Martin, Fitzg., 302, *Accord.* In the case last cited, Lee, C. J., said: "There is a difference between a conditional

WATKINS *v.* PERKINS.

AT NISI PRIUS, CORAM LORD HOLT, C. J., EASTER TERM, 1697.

[*Reported in* 1 *Lord Raymond*, 224.]

PER HOLT, C. J. If A promise B, being a surgeon, that if B cure D of a wound, he will see him paid; this is only a promise to pay if D does not, and therefore it ought to be in writing by the Statute of Frauds.[1] But if A promise, in such case, that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing.[2]

BUTCHER *v.* ANDREWS.

IN THE KING'S BENCH, EASTER TERM, 1698.

[*Reported in Comberbach*, 473.[3]]

ASSUMPSIT. The plaintiff declares that the defendant, in consideration the plaintiff would lend his son £10, promised to pay it. Upon *non assumpsit* pleaded, and *Verdict pro quer'*, it was moved in arrest of judgment, that the promise of the father wanted a sufficient consideration; and this difference was taken by HOLT, C. J., where the promise of the father is in consideration, that the plaintiff would lend money, etc., and where it is in consideration that he would pay money to his son. In the former case an *indebitatus assumpsit* lies not against the father, for it is a collateral promise, and ought to be in writing, accord-

and an absolute undertaking; as if A promise to pay B such a sum if C does not, there A is but a security for C. But if A promise that C will pay such a sum, A is the principal debtor; for the act done was on his credit, and no way upon C's." — ED.

[1] The promise being collateral, the Statute of Frauds applied in the following cases: Puckett *v.* Bates, 4 Ala. 390; Walker *v.* Irwin (Iowa, 1895), 62 N. W. R. 785; Birchell *v.* Neaster, 36 Oh. St. 331; Bixby *v.* Church (Oregon, 1895), 42 Pac. R. 613; Lewis *v.* Albert Co., 156 Pa 217; Skinner *v.* Conant, 2 Vt. 453; Steele *v.* Towne, 28 Vt. 771. — ED.

[2] Credit being given exclusively to the defendant for services rendered to another, the Statute of Frauds did not apply in Darnell *v.* Tratt, 2 C. & P. 82; Milliken *v.* Warner, 62 Conn. 51; Crowder *v.* Keys, 91 Ga. 180; Brandner *v.* Krebbs, 54 Ill. Ap. 652; Peyson *v.* Conniff, 32 Neb. 269; Hazletone *v.* Wilson, 55 N. J. 250; Snell *v.* Rogers, 70 Hun, 462; Barrett *v.* Johnson, 77 Hun, 527; Boston *v.* Farr, 148 Pa. 220. Walker *v.* Norton, 29 Vt. 226; Eddy *v.* Davidson, 42 Vt. 56; Weisel *v.* Spence, 59 Wis. 301; Murphy *v.* Gates, 81 Wis. 370. — ED.

[3] Salk. 23; Carth. 446, s. c. — ED.

ing to the Statute of Frauds;[1] but in the other case, payment to the son upon the request of the father is in law a payment to the father, who is the only debtor, and therefore shall be liable to the action.[2]

BUCKMYR *v.* DARNALL.

In the Queen's Bench, Michaelmas Term, 1704.

[*Reported in* 2 *Lord Raymond*, 1085.[3]]

An action upon the case wherein the plaintiff declared that the defendant, in consideration the plaintiff, at his request *locaret et deliberaret cuidam* Josepho English a gelding of the plaintiff's *ad equitandum et itinerandum usque ad* Reading *in comitatu* Berks, *assumpsit et promisit* the plaintiff, *quod* the said Joseph and Charles the said gelding to the plaintiff *redeliberarent*, etc. Upon *non assumpsit* pleaded, this cause came to trial before Holt, Chief Justice, at Westminster Hall; and the counsel for the defendant insisting that the plaintiff ought to produce a note in writing of this promise, within the Statute of Frauds, 29 Car. 2, c. 3, s. 4; and the Chief Justice doubting of it, a case was made of it, and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by Sergeant Darnall for the defendant, and by Mr. Raymond for the plaintiff. And it was insisted for the defendant that this case was within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, for it was a promise to answer for the default and miscarriage of the person the horse was lent to. The very letting out and delivery of the horse to English implies a contract by English to re-deliver him, and he is bound by law so to do, and consequently the defendant is to answer for the default of another. In a case, 2 Will. & Mar., your Lordship settled this rule, that where an action will lie against the party himself, there an undertaking by J. S. is within the statute; and where no action will lie against the party himself, there it is otherwise. And therefore I agree this case, that if a man should say to another, "Do you build a house for J. S. and I will pay you," that case is not within the statute, because there J. S. is not liable. But this case is not more than this, if a man should say, "Do you let J. S. have goods, and if he does not pay you I will," and this is within the statute, because an action will lie against J. S. for the money for the goods. Or, if a man should say, "Take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible," that is also within the statute.

To this it was answered for the plaintiff, that here the credit was

[1] Marriot *v.* Lister, 2 Wils. 141; Radcliffe *v.* Poundstone, 23 W. Va. 724, *Accord.* — Ed.

[2] Harris *v.* Huntbach, 1 Burr. 373; Pearce *v.* Blagrave, 3 Com. Law, 338; Davis *v.* Tift, 70 Ga. 52, *Accord.* — Ed.

[3] 6 Mod. 248; Salk. 27; 3 Salk. 15; Holt, 606, s. c. — Ed.

wholly given to the defendant; that that rule of the sergeant's must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case, for an actual conversion, or for refusing to re-deliver the horse, English may be charged in trover or detinue; yet, he being not chargeable upon the contract, the case is not within the statute. This contract cannot be said properly to be a promise to answer for the default or miscarriage of another, unless English were liable by the first contract.

Upon the first motion and arguing this case, the three judges against Powys seemed to be of opinion that this case was not within the statute, because English was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And Powell, Justice, said that that rule, of what things shall be within the statute, is not confined to those cases only, where there is no remedy at all against the other, but where there is not any remedy against him on the same contract. This case is just like the case where a man says, "Send goods to such a one, and I will pay you;" that is not within the statute, for the seller does not trust the person he sends the goods to. So here the stable-keeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent he may be charged in detinue, or trover and conversion, which is a collateral action.

Powys, Justice, said that there was a trust to English, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute.

Powell, Justice, agreed, that if a man should say, "Lend J. S. a horse, and I will undertake he shall pay the hire of it," or, "Send J. S. goods, and I will undertake he shall pay you," that those cases would be within the statute; and agreed with Powys, that if any trust were given to English, then the case would be within the statute. But he and the Chief Justice and Gould held, that here was no credit given to English; and the Chief Justice agreed with him, that if there had, this promise would have been but an additional security, and within the statute. And the Chief Justice said, that if a man should say, "Let J. S. ride your horse to Reading, and I will pay you the hire," that is not within the statute, no more than if a man should say, "Deliver cloth to J. S., and I will pay you." He said also, that a bailee of an horse for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excused. And so it was ruled in the case of Coggs *v.* Bernard.[1]

The last day of the term the Chief Justice delivered the opinion of the Court. He said that the question had been proposed at a meeting of judges, and that there had been great variety of opinions between them,

[1] 2 Stra. 916.

because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion that the case was within the statute. The objection that was made was, that if English did not re-deliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and consequently this promise by the defendant is collateral, and is within the reason and the very words of the statute; and is as much so as if, where a man was indebted, J. S., in consideration that the debtee would forbear the man, should promise to pay him the debt, such a promise is void unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, "I will not sell him the goods unless you will undertake he shall pay me for them," such a promise is within the statute; otherwise, if a man had been the person to pay for the goods originally. So here detinue lies against English the principal; and the plaintiff having this remedy against English the principal, cannot have an action against the defendant the undertaker, unless there had been a note in writing.[1]

T. LAKEMAN, Appellant, *v.* J. P. MOUNTSTEPHEN, Respondent.

In the House of Lords, May 5, 1874.

[*Reported in Law Reports, 7 English and Irish Appeals,* 17.]

This was an appeal against a judgment by the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench. The case has already been fully reported in the courts below.[2] The following is a summary of the facts: Lakeman was the chairman of the board of health of the town of Brixham. Mountstephen was a builder and contractor at Torquay, and had often executed works for the board. He had in the early part of 1866 completed for the board a main sewer for the town, and the board had directed him to make a purchase of pipes, and had given notice under the 11 & 12 Vict. c. 63, s. 69 (the Public Health Act of 1848), to the owners of certain houses near this main sewer to connect the drains of their houses with it, or that the board would make the connections at their expense. These persons had not obeyed the notice, and the board

[1] Billingsley *v.* Dempewolf, 11 Ind. 414, *Accord.*

Compare Tindal *v.* Touchberry, 3 Strob. 177, where the delivery of a chattel to A, at the defendant's request, was regarded by the Court as, in truth, a bailment to the defendant. — Ed.

[2] Law Rep. 5 Q. B. 613; Ibid. 7 Q. B. 196.

therefore possessed the power to make the connections and to charge the inhabitants, to whom notice had thus been given, with the cost thereof. The board, however, had not passed any resolution so to do. Adams, the surveyor of the board, had proposed to Mountstephen to construct these connections. The latter did not do so, as he had no orders from the board. On the 5th of April, 1866 (which was before the expiration of the notice given to the householders), according to Mountstephen's evidence, he, after finishing the main sewer, was about to take away his carts and building materials, when, after some talk with Adams, a conversation ensued between him and Lakeman. The latter said, "What objection have you to making the connections?" Mountstephen answered, "None, if you or the board will order the work, or become responsible for the payment," to which Lakeman replied, "Go on, Mountstephen, and do the work, and I will see you paid." Mountstephen did the work; but the board, alleging that no orders had been given for the work, declined to pay for it. Mountstephen then brought an action against Lakeman for the amount due for the work.

The declaration contained three counts. The first stated that the defendant was the chairman of the board, and that in consideration that the plaintiff would do and provide certain work and materials for the board at the request of the defendant, as and assuming to be agent for the board, the defendant promised the plaintiff that he was authorized by the board to make the request; that the plaintiff, relying on the defendant's promise, did the work; breach, that the defendant was not so authorized.

The second count stated that the defendant, being such chairman, in consideration that the plaintiff would do and provide work and materials for the board, at the request of the defendant, the defendant promised to obtain for the plaintiff from the board a contract whereby the board should be legally bound: breach, that the defendant did not obtain such contract. The third count was for work and materials done and supplied by the plaintiff to the defendant at his request.

The defendant pleaded, 1, to the first and second counts, that the defendant did not promise as alleged; 2, that the plaintiff did not do the work for the board at the defendant's request; and 3, never indebted.

The cause was tried before Lord Chief Baron Kelly at the Devon Summer assizes, 1870, when, by the permission of the learned judge, a count was added alleging that the defendant promised that in consideration that the plaintiff would do the work for the board, the defendant promised to pay for the work if the board should at any time refuse to pay.

At the close of the plaintiff's case the defendant's counsel submitted that, on the declaration and the evidence (as it then stood), there must be a nonsuit. The learned judge declined to nonsuit, being of opinion that there was evidence to go to the jury, and he gave leave to the

plaintiff to add the count as above stated. The defendant's case was then entered on, when the statement of the conversation, as detailed in plaintiff's evidence, was denied. At the close of the case the Lord Chief Baron left it to the jury to say whether the conversation, as deposed to by the plaintiff, but denied by the defendant, had taken place. The jury returned a verdict for the plaintiff for £287, and leave was then reserved to the defendant to move to set aside this verdict and enter a nonsuit, if the Court should be of opinion that there was no evidence, either upon the original or amended declaration, which ought to have been left to the jury. A rule for that purpose was obtained and was made absolute,[1] the Court being of opinion that, coupling the expressions used with the conduct and position of the parties, the defendant's words did not amount to an engagement to be primarily liable for the work, but only to a promise that if the plaintiff would do the work on the credit of the board the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within sect. 4 of the Statute of Frauds, though in fact the board had never been indebted, and as this promise was not in writing it could not be enforced.

On appeal to the Exchequer Chamber this decision was reversed, that Court being of opinion that there was evidence to go to the jury on the question whether the defendant had not by his words made himself primarily liable.[2]

This appeal was then brought.

Mr. Cole, Q. C., and *Mr. Francis Pinder*, for the appellant.[3]

Mr. Lopes, Q. C., and *Mr. Arthur Charles*, for the respondent, were not called on.

THE LORD CHANCELLOR (Lord Cairns): —

My Lords, the question, and the only question which your Lordships are called upon in this appeal to decide is, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff in the action for the work to be done. I begin by pointing out to your Lordships that that is the question, and the only question in the action, for the purpose of reminding you that we are not embarrassed here by any consideration as to whether the precise sum for which the verdict of the jury was returned, is the sum which ought to have been assessed as the amount to be paid in the action. Whatever questions might have been raised, whatever distinctions might have been made as to different items of the demand, this is not the time or the place for making them. If it was desired to make them, and if there was room for making them (which I am far from saying there was not), it ought to have been done at an earlier stage in these proceedings.

My Lords, taking the question raised by the rule which was obtained

[1] Law Rep. 5 Q. B. 613.

[2] Law Rep. 7 Q. B. 196.

[3] The argument for appellant and the concurring opinions of LORDS HATHERLEY, O'HAGAN, and SELBORNE are omitted. — ED.

Lakeman v Mountstephen

T was a contractor, & D was mem of a county board. P was doing some work for Co., & some other work was contemplated, & P's bid had been given & D wanted work done in a hurry. so he told P "Go on & do the work, & I will see you paid". This was in writing. P did work, was not paid by board & sues D, counts being a promise of authorization by board, a promise to obtain a contract with board, & a contract of suretyship. verdict for P, with leave reserved to set aside verdict if Ct should be of opinion that there was no evidence on which to go to jury. Ct made rule absolute thinking it was contract of suretyship, & came within Statute of Frauds. Exch Chamb reversed this thinking there was evidence of primary liability on part of D.

H. of L. affirmed this. Under the circumstances of case, there was existence of primary liability, especially since no other contract could have been made at that time.

In the first instance, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff for the work to be done, I may remind your Lordships that that question falls to be determined really upon the consideration of the evidence of the plaintiff in the action himself. It is true that another witness was called on behalf of the plaintiff, but his evidence on this subject is quite immaterial, and we have the evidence of the plaintiff only to deal with. My Lords, that evidence might have been accepted by the jurymen or it might have been rejected; they might have been so satisfied with the evidence adduced on the other side as to lead them to disbelieve the evidence of the plaintiff, but the question, I repeat, is, whether or not in this case the learned judge would have been right in directing a nonsuit on the ground that there was no substantial evidence to go to the jury.

Now I will call your Lordships' attention, for a few moments, to what the plaintiff really did say, because, I think, if the two portions of his evidence, which at first sight appear rather disconnected, are brought into their proper order, a very clear and intelligible account of the origin of this contract will be given. The plaintiff says in his cross-examination, referring to the 19th of March and to the resolution of the board of that date, "that notices should be served by the board;" that is, notices upon the owners of houses who were to be required to connect their drainage with the main drainage of the town: "I knew nothing of this." And then, at another part, "Adams asked me if I would procure 1300 feet of pipes, and if I would do the work." He was asked two things; if he would procure the materials, and if he would do the work. "I said 'not unless the board would be responsible for the payment, for I would not take orders from the owners of the property.' I know they must have notices before they are liable. I think it is twenty-one days' notice." Then a resolution of the board was put in "for notice to owners and occupiers, and that Mountstephen procure 1300 feet of pipes." That appears to have been communicated to him, as I gather from the next portion of his evidence, for he continues, "I proceeded then according to that order, but I refused to do the work unless the board would make themselves responsible."

I understand that as being a very clear statement; it may be accurate or inaccurate, that is another question; but it is a very clear statement by the plaintiff that he had his attention called to the danger of proceeding in these cases without a distinct formal authority from a board, like the local board in this case, and that in the first instance he would neither procure materials nor do the work without the order of the board; that he got from the board a proper order with which he was satisfied with regard to the materials. He may have been right or wrong in thinking it a proper order, but he was satisfied with it; but he had no order of the board with regard to the work to be done, and he refused, therefore, to do that work.

Then, turning to another part of the evidence, we have from him an account of a conversation which took place between him and Mr. Lake-

man, the appellant, which must have been some days afterwards. He had finished some works connected with the main drainage, and he says: "We had just finished everything." Lakeman (the defendant) said: "What objection have you to make these connections?" From which I should infer that Adams had told Lakeman that although the materials had been supplied, there was an objection to doing the work, "meaning the laying down of the junction pipes. I said: 'I have no objection to do the work if you or the local board will give me the order.' He" (that is Mr. Lakeman) "was chairman of the local board of health for Brixham. He said: 'Mountstephen, you go on and do the work, and I will see you paid.'"

Your Lordships have had very ingenious arguments addressed to you, putting various constructions upon these few words. It has been suggested that the effect of these words was that Mountstephen must be taken to have asked Mr. Lakeman first for an order from the board, and to have been satisfied that he, as chairman of the board, could then and there give the order, and to have had through him then and there an order from the board, and yet that, not being satisfied with that order then and there thus obtained, he desired to superadd, and he had superadded to it, a virtual guaranty by Lakeman that he, personally, would guarantee that the board would pay the money. My Lords, I must say that that does appear to me to be a most strange and violent construction placed upon a few simple words. As it appears to me, a very natural meaning (and it is quite sufficient for the present purpose) of these words is this, that Mountstephen, following up that course of action which he had previously pursued with Adams, stated to Lakeman that the reason why he refused to do the work was, that he had got no order from the board to do it, that he would do the work if he had a formal order from the board, or if he had a personal order from Lakeman himself, and that thereupon Mr. Lakeman — who for some reason, the stringency of which it is not for your Lordships now to inquire into, wished the work to be immediately done — that thereupon Mr. Lakeman said: "You go on and do the work; do not concern yourself upon the subject of whether you have an order from the board, or have not such an order. You go on and do the work, and I will be your paymaster. I will see you paid." Now, my Lords, if that is the meaning of these words, and it appears to me certainly to be the *prima facie* and natural meaning of the words, I think there was ample and strong evidence to go to the jury that the go-by was entirely given to the question of an order of the local board, and that Mr. Lakeman stepped in and undertook himself, as a matter of primary liability, to pay for the work that would be done. Against that primary liability he might afterwards, as chairman of the board, have sheltered himself by obtaining from the board the consent to make a formal order, and acting upon and paying under that formal order. But that was for him to consider; he did that which the contractor required to be done — he put the contractor in the position of having then and there an absolute contract made — and the

only contract which then and there absolutely could be made, would be a personal and primary contract by him to pay the contractor for the work to be done. My Lords, it appears to me that there was clearly substantial evidence in the case to go to the jury, and that any judge who had to try this case would have miscarried, if upon this evidence he had held that there was no case to go to the jury.

I shall, therefore, submit to your Lordships that the decision of the Court of Exchequer Chamber is correct, and that this appeal should be dismissed.

Judgment of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.[1]

[1] LORD SELBORNE, in the course of his opinion, said (p. 24): "There are some observations in the opinions of the learned judges in the Court of Queen's Bench which certainly do look at first sight as if some of those learned judges thought that there might be a valid contract of suretyship, or a secondary liability upon the principle of a guaranty for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed."

In the Exchequer Chamber, Wilkes, J., said, L. R. 7 Q. B. 202: "The leading case upon the application of the Statute of Frauds has generally been considered to be Birkmyr *v.* Darnell, and in the note to Mr. Evans's edition of Salkeld's Reports it is stated that 'from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing.' I think that may very well be modified: 'Or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void:' so as to include the case which I put to Mr. Charles of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not. The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would fail."

See further, Hooker *v.* Russell, 67 Wis. 257. — ED.

CHARLES C. MEASE *v.* ANN WAGNER.

IN THE CONSTITUTIONAL COURT, SOUTH CAROLINA, MAY TERM, 1821.

[*Reported in* 1 *McCord*, 395.]

THIS was an action for the articles furnished the funeral of Mrs. Bradley, at the request and by order of the defendant. Mrs. Bradley was the widow of Dr. Bradley, who left her his estate during life, remainder to his nephew, John Bradley. Mrs. Bradley, prior to her death, expressed a wish to be buried in a particular manner. As soon as she expired, the defendant was sent for as a friend of the family, and she undertook to procure the articles necessary to such a funeral as the deceased had desired. She proceeded to the shop of the plaintiff, where she selected the articles required, saying they were for Mrs. Bradley's funeral. She was asked "by whom they were to be paid for." She replied, "Charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town he will pay for them, or I will." The articles furnished were such as were suitable to the condition in which Mrs. Bradley had lived.

On the arrival of the nephew in the city, the account was presented to him, and he refused to pay it, saying that the defendant had no authority to procure the articles at his expense. The defendant was then applied to, and she refused payment. Some time after this refusal, one of the witnesses remonstrated with the nephew on the impropriety of his conduct, when he said he would pay it, but did not. It appeared that a Miss Teabont administered upon the estate of Mrs. Bradley.

The counsel for the defendant contended that she was responsible, as it was a collateral and not an original undertaking.

The Court charged the jury that it was an original and not a collateral undertaking, and that the defendant was liable.

A verdict was accordingly rendered for the plaintiff.

A motion was now made for a new trial, on the ground that the Court misdirected the jury.

MR. JUSTICE HUGER delivered the opinion of the Court.

It has been regarded as settled doctrine ever since the case of Buckmyr *v.* Darnall, that when no action will lie against the party undertaken for, it is an original promise. If A promise B that in consideration of his doing a particular act, C shall pay him such a sum, and if C do not pay him, he, A, will pay the same, this is said to be no collateral undertaking on the part of A unless C was privy to the contract, and recognized himself as debtor also (Fitzgibbon, 302, Robt. on Frauds, 223). In the case before me, the defendant undertook for the representative of Dr. Bradley, against whom no action could lie for the articles furnished for the funeral of Mrs. Bradley. And there was no privity of contract between the plaintiff and the nephew of Dr. Bradley. But it has been urged

Mease v Wagner

Mrs Bradley desired a certain kind of funeral, & Δ undertook to provide it. She ordered goods of Π, stating charge them to estate of Dr B. & as soon as his nephew comes to town he will pay for them; or D will." Nephew did not pay, & on administration this debt was not paid. Later nephew promised to pay, but did not. Now Π charged that it was an original undertaking & D was liable.

Sup Ct affirmed this. If no action lies against the party undertaking for, undertaking is original, [illegible] but if [illegible] for Π.

dictum, that had Δ's promise had been to pay if estate did not, result would have been diff.

It also was held that [illegible] did not affect nature of contract.

Is it contract, & its nature determined at time of promise, & here it was intended to be a surety-ship obligation, & not a primary obligation? Hence case would seem to be wrong.

Bushell v Beavan

Assumpsit: a promised π to procure one Macqueen to sign a guaranty, & to have it delivered within a certain time. Consideration was removal by π of a stop on a certain vessel. Objection was that it was a promise to answer for debt of another, in which the consideration was not stated.

It held that it was not a suretyship obligation, & that consideration need not be in writing & that promise was not necessary to any primary obligation.

that the subsequent promise of the nephew had a retroactive operation, and rendered him liable; but if he were not liable before the promise was made, he could not be so afterward. It was not in writing, and was *nudum pactum*. Had the defendant undertaken *for the estate or legal representative of Mrs. Bradley*, who was legally bound to pay the expenses of her funeral, it would have been a different question; but she unfortunately undertook for one who was not responsible, and who was so far from being privy to the contract, or acknowledging himself a debtor, refused payment, and denied the authority of the defendant to render him responsible.

I am of opinion, therefore, that the motion must be refused.

Justices Nott, Johnson, Richardson, and Colcock concurred.

Mr. Justice Gantt dissented.

King, for the motion.

Hunt, contra.

BUSHELL and Others *v.* BEAVAN.

In the Common Pleas, June 5, 1834.

[*Reported in* 1 *Bingham, New Cases*, 103.]

Tindal, C. J.[1] This is an action of *assumpsit*, brought by the plaintiffs to recover damages for the breach, by the defendant, of a promise to procure one Thomas Potter Macqueen to sign a written guaranty, and to cause the same to be delivered to the plaintiffs within a certain time.

It is objected, that the promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another person; and that no action is maintainable upon it according to the well-known rule of law, because the consideration of the promise does not appear in writing as well as the promise itself. The promise on which the first count is framed is an undertaking by the defendant to get a copy of a guaranty which is written above it, duly signed by Mr. Potter Macqueen, and, within a week afterwards, delivered to the plaintiffs' agent. The immediate consideration for that promise was the removal by the plaintiffs of a stop which they had put upon the vessel, then lying in St. Katharine's Docks, and the permitting her to sail on the voyage before the security was signed. Under these circumstances the contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person, but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen

[1] Everything is omitted except the opinion of the Court relating to the Statute of Frauds. — Ed.

had signed the guaranty, that guaranty would, indeed, have been within the Statute of Frauds; for his is an express guaranty to be answerable for the freight due under the charter-party, if Sempill did not pay it. But no person could be answerable on the promise to procure his signature but the defendant. Sempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was, therefore, no default of any one for which the defendant made himself liable; but he did so simply upon his own immediate contract. For, as to any default of Sempill in paying the freight, the action, on the undertaking of the defendant, could not be dependent on that event; for it would have been maintainable if the guaranty were not signed at any time after the day on which the defendant engaged it should be given; that is, long before the time when the freight became payable. *Judgment for plaintiff's accordingly.*[1]

SOLOMON TOWNE *v.* NATHANIEL GROVER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1830.

[*Reported in* 9 *Pickering*, 306.]

ASSUMPSIT. The declaration alleged that the defendant employed one Newell, a housewright, to build for him a house; that Newell was to do all the work and find all the materials, and the defendant was to pay him therefor the sum of 1400 dollars when the house should be completed; that Newell being indebted to the plaintiff in the sum of 790 dollars, partly for materials supplied and used for building the house, and being desirous of purchasing more lumber to finish the house, the plaintiff refused to sell him any more, unless the defendant would cause the plaintiff to be secured out of the amount which the defendant should owe to Newell when the house should be completed, as well for the sum then due to the plaintiff, as for what might become due for materials afterwards sold to Newell to finish the house; that in consideration of the premises the defendant promised the plaintiff that if he would sell and deliver to Newell the lumber necessary to finish the house, he, the defendant, would not settle with Newell for the house, until he had given the plaintiff sufficient notice, after the completion of the house, so that the plaintiff might secure himself by

[1] For analogous cases, where defendant's promise was not accessory to any similar primary liability, see Elkins *v.* Hart, Fitzg. 202; Jarmain *v.* Algar, 2 C. & P. 249; Marion *v.* Faxon, 20 Conn. 486; Ingraham *v.* Strong, 41 Ill. Ap. 46; Jepherson *v.* Hunt, 2 All. 417; Douglass *v.* Jones, 3 E. D. Sm. 551; Sampson *v.* Swift, 11 Vt. 315; Bellows *v.* Sowles, 57 Vt. 165.

The principal case was criticised adversely in Carville *v.* Crane, 5 Hill, 483, 485. — ED.

process of attachment upon the defendant as trustee of Newell for the whole of the debt which should be then due from Newell to the plaintiff; that relying on this promise, the plaintiff forbore to take measures to secure his debt against Newell, and gave him further credit to the amount of 98 dollars, but that the defendant afterwards, the house not being then completed, settled with Newell without giving the plaintiff notice, and paid Newell, by negotiable notes, 760 dollars, the balance due, and that Newell immediately absconded and was wholly unable to pay, by reason of which the plaintiff had lost his debt.

The cause was tried before WILDE, J., on the general issue. The plaintiff offered the testimony of a witness to prove the promise; to the admission of which the defendant objected, on the ground that the promise was within the Statute of Frauds and could be proved only by writing. But the objection was overruled, and the evidence admitted; to which the defendant excepted. The verdict was for the plaintiff.

Fletcher, for the defendant.

Nichols, for the plaintiff.[1]

PER CURIAM. The plaintiff shows a fair ground of action, having parted with his property on the faith of the defendant's promise. We think the promise is not within the Statute of Frauds. It is a separate, independent agreement, having no reference to the debt of Newell except as to the measure of damages. The defendant was not to pay the debt of Newell, but was to give notice previously to making a settlement with him, which would enable the plaintiff to obtain payment of his demand. Whether Newell paid the debt or not, the promise of the defendant would remain to be performed.

Judgment on the verdict.

KIRKHAM v. MARTER.

IN THE KING'S BENCH, MAY 21, 1819.

[*Reported in 2 Barnewall & Alderson*, 613.]

THE declaration stated that one T. E. Marter, before the making of the promise of defendant, had, without the leave or license of the plaintiff, wrongfully ridden a horse of the plaintiff's, in consequence whereof the horse died; that the plaintiff had threatened to commence an action against the said T. E. M. for the recovery of such damages as plaintiff had sustained by reason of the premises; and thereupon, in consideration of the premises, and that the plaintiff at the request of defendant, would not bring any action against the said T. E. M. for the cause aforesaid, and that plaintiff would be content to take, for and on account of the said horse, what should be agreed upon between the

[1] The arguments of counsel are omitted. — ED.

defendant and one A. B., defendant promised to pay plaintiff what should be agreed upon between defendant and said A. B., for and on account of said horse. Averment, that plaintiff had brought no action for the cause aforesaid, and that he was willing to take, for and on account of the horse, what had been agreed upon between the defendant and A. B., and that defendant and A. B. did agree that defendant should pay plaintiff fifty guineas for the said horse, and the bill due for the maintenance and keep of the said horse, and that the same should be paid before the then next Epsom races. Declaration then averred, that that bill before the then next Epsom races was ascertained to amount to a certain sum therein mentioned. Breach, non-payment of the said several sums. Plea, general issue.

The cause was tried on Thursday, 13th May, at the second Middlesex sittings in this term, before ABBOTT, C. J., when the plaintiff proved a verbal contract, as laid in the declaration. ABBOTT, C. J., thought this an undertaking for the default or miscarriage of another, within the Statute of Frauds; and, consequently, that the promise ought to have been in writing, and the plaintiff was nonsuited.

Abraham now moved for a new trial.[1]

ABBOTT, C. J. This case is clearly within the mischief intended to be remedied by the Statute of Frauds; that mischief being the frequent fraudulent practices which were too commonly endeavored to be upheld by perjury; and if it be within the mischief, I think the words of the statute are sufficiently large to comprehend the case. The words are these: "No action shall be brought to charge a defendant upon any special promise to answer for the debt, default, or *miscarriage* of another person." Now the word "miscarriage" has not the same meaning as the word "debt" or "default;" it seems to me to comprehend that species of wrongful act for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages; and, therefore, in my judgment, falls within the meaning of the word "miscarriage." The case of Read and Nash is very distinguishable from this: the promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault, brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original, and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son. I therefore think that the nonsuit was right. *Rule refused.*[2]

[1] The argument of counsel and the concurring opinions of HOLROYD and BEST, JJ., are omitted. — ED.

[2] Turner *v.* Hubbell, 2 Day, 457 (*semble*); Baker *v.* Morris, 33 Kas. 580 (*semble*); Jacobs *v.* Burgwyn, 63 N. C. 196 (*semble*).

Towne v Grover

Newell was doing work on house for D, & D was to pay him on completion of house. Newell owed money to P, & wanted more credit, P refused until D would promise to give P sufficient notice so that P could secure himself by attachment. D paid Newell without notice, who absconded, & P was not paid & now he sues. D objected that it was not within the Statute of Frauds, over-ruled & verdict for P.

Sup Ct gave judgment for P. Promise was separate & did not refer me to debt to Newell except incidentally. [illegible]

D was not to pay the debt of Newell but was to give notice previously to making a settlement with him wh would enable the plf to obtain paym of his demand.

[illegible] v [illegible], 2 Johns. 613 - 1819

declaration that one T.E.M. had wrongfully taken P's horse & ridden it, so that it died. In consideration of no suit, D promised that he & A.B. would ascertain value of horse, & D would pay that value. D never paid value, & suit for it. D contended that it was within the statute of frauds. verdict for D below.

Abbott, C.J. judgment for D. [illegible] for the [illegible] of another, that a verbal [illegible] act for the consequences of [illegible] civilly responsible & liable for the [illegible]

Read v Nicol

π brot assault ~ one Johnson, & ~ i ? withdrawal
`6 action/ Δ ν0| - pay π £50 & cost, > suit. The
suit, withdrawn but ~ not paid & suit for money.
Δ pleaded nova assumpsit & the Statute of Frauds.

Lee C.J. held that case did not come within the statute
The promise was absolute & unconditional, & not to answer
for the debt of another, because John was not a debtor.

READ, Executor of TUACK, v. NASH.

In the King's Bench, Trinity Term, 1751.

[*Reported in* 1 *Wilson*, 305.]

Tuack, the plaintiff's testator, brought an action of assault and battery against one Johnson; the cause being at issue, the record entered and just coming on to be tried, the defendant Nash being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, undertook and promised to pay Tuack £50 and the costs in that suit to be taxed till the time of withdrawing the record, in which taxation all such sums of money were to be allowed as Tuack had paid and was liable to pay to his attorney and witnesses who attended the trial; Tuack, relying upon his promise, did withdraw his record, and no further proceeding was had in that cause. Tuack being dead, Read, his executor, has brought his action upon this special promise and undertaking by Nash.

The defendant has pleaded *non assumpsit*, and thereupon issue is joined to the country. Secondly, He has pleaded the Statute of Frauds and Perjuries.

To this plea the plaintiff has demurred, and the defendant has joined in demurrer.

This case was twice argued at the bar, and after time taken by the Court to consider, the Chief Justice delivered the opinion of the Court.

Lee, C. J. The single question is, Whether this promise, which is confessed by the demurrer not to have been in writing, is within the Statute of Frauds and Perjuries; that is to say, whether it be a promise for the debt, default, or miscarriage of another person; and we are all of opinion that it is not, but that it is an original promise sufficient to found an assumpsit upon against Nash, and is a lien upon Nash, and upon him only. Johnson was not a debtor, the cause was not tried, he did not appear to be guilty of any default or miscarriage, there might have been a verdict for him if the cause had been tried for anything we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an *original* promise and a *collateral* promise; the *first* is out of the statute, the *latter* is not when it is to pay the debt of another which was already contracted.

Judgment for the plaintiff.[1]

[1] See for analogous cases, Jepherson v. Hunt, 2 All. 417; Bellows v. Sowles, 57 Vt. 165. — Ed.

ALVIN DEXTER v. WILLIAM E. BLANCHARD.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1865.

[*Reported in* 11 *Allen*, 365.]

CONTRACT brought upon an oral promise by the defendant to pay to the plaintiff a bill for the hire of horses and carriages, and for injury to a wagon.

At the trial in the Superior Court, before MORTON, J., the plaintiff offered to prove that the horses and carriages were hired and the injury done by the defendant's minor son, to whom the credit therefor was given; and that not long after the date of the last charge the defendant's son became sick, and while so sick the plaintiff several times demanded payment of him, and thereupon the defendant verbally promised to pay the plaintiff's bill, if the plaintiff would not trouble his son any further; to which the plaintiff agreed. The son afterwards died. It was admitted that the bill was not for necessaries.

The judge ruled that upon these facts the action could not be maintained, and a verdict was returned accordingly for the defendant. The plaintiff alleged exceptions.

E. L. Sherman, for the plaintiff.

W. Brigham, for the defendant.

BIGELOW, C. J. The ruling of the Court was in accordance with well-established principles. The defendant's promise, although it may have been made on a good consideration as to the plaintiff, was nevertheless a promise to pay the debt of another, and no action can be maintained upon it. Gen. Sts. c. 105, § 1. The fallacy of the argument urged in behalf of the plaintiff lies in the assumption that there was in fact no debt due from the son of the defendant, because he was a minor at the time he undertook to enter into a contract with the plaintiff. A debt due from a minor is not void; it is voidable only; that is, it cannot be enforced by a suit at law against the contracting party, on plea and proof by him of infancy. But it is voidable only at the election of the infant, and until so avoided it is a valid debt. Nor can a third person avail himself of the minority of a debtor to obtain any right, or security, or title. Infancy is a personal privilege, of which no one can take advantage but the infant. Kendall *v.* Lawrence,[1] Nightingale *v.* Withington,[2] McCarty *v.* Murray.[3]

The effect of the doctrine contended for by the counsel for the plaintiff would be that a verbal agreement to answer for the debt of another would be valid, if it could be shown that the original contracting party could have established a good defence to the debt in an action brought against him. We know of no principle or authority on which such a proposition can be maintained. It certainly would open a wide door

[1] 22 Pick. 540. [2] 15 Mass. 274. [3] 3 Gray, 578.

for some of the mischiefs which the Statute of Frauds was designed to prevent.

The case for the plaintiff derives no support from the argument based on proof of an agreement by the plaintiff to forbear to sue the defendant's son, in consideration of the promise of the latter to pay the debt. It is perfectly well settled that it is not a sufficient ground to prevent the operation of the Statute of Frauds, that the plaintiff has relinquished an advantage or given up some lien or claim in consequence of the defendant's promise, if that advantage or relinquishment did not also directly enure to the benefit of the defendant. It is only when such relinquishment or surrender operates to transfer to the defendant the right, interest, or advantage which the plaintiff gives up, or to create in the defendant some title or benefit derived from that which the other party surrenders, that the promise can be regarded as an original undertaking, and not within the statute. Curtis *v.* Brown,[1] and cases cited. *Exceptions overruled.*[2]

GOODMAN AND OTHERS *v.* CHASE.

IN THE KING'S BENCH, HILARY TERM, 1818.

[*Reported in* 1 *Barnewall & Alderson*, 297.]

ASSUMPSIT.[3] Plea, general issue. The cause came on to be tried before ABBOTT, J., at the last assizes for Hampshire, when a verdict was taken for the plaintiffs for £686, subject to the opinion of the Court on the following case: —

The plaintiffs having recovered the judgment (mentioned in the declaration) against William Chase the younger, sued out a *ca. sa.*, under which he was arrested on the 12th August, 1816. On his arrest he applied to the plaintiff's attorney for time to get the money, and in the mean time to be released from custody; to which the plaintiff's attorney consented, provided defendant (the father of the said Wm. Chase the younger) would sign a written paper, which was delivered to John Handley, the sheriff's officer, to be taken to the defendant for that purpose. Immediately on receiving that paper, Handley, having the said Wm. Chase the younger still in his custody, waited on the defendant, who knew him to be a sheriff's officer, and delivered the paper to the defendant, having first read it over to him in the presence of Wm. Chase the younger, and having at the same time informed the defendant that Wm. Chase the younger was in his custody, and that

[1] 5 Cush. 488.

[2] Scott *v.* Bryan, 73 N. C. 582; Brown *v.* Farmers' Bank (Tex. 1895), 31 S. W. R. 285, *Accord*.

King *v.* Summit, 73 Ind. 312, *Contra*. — ED.

[3] The report of the declaration and the arguments of counsel are omitted. — ED.

the plaintiff's attorney was ready to let the said Wm. Chase the younger out of his custody if the defendant would sign that paper; upon which the said defendant read the paper over, and signed it: the contents of the paper were as follow, viz. "I do hereby undertake and agree to put the above defendant into the custody of the sheriff of Hampshire on or before Saturday next, and in default of my doing so I undertake to pay the damages and costs for which the said defendant has been this day taken in execution by the said sheriff at the suit of the above-named plaintiffs." Dated, &c. The paper so signed was returned by Handley to the plaintiff's attorney, by whose consent the said Wm. Chase the younger was thereupon discharged out of custody; he did not, however, return into the custody of the sheriff on or before the Saturday next after the date of the said written paper, nor hath the £686, nor any part thereof, been paid. The said Wm. Chase the younger did, however, on the 6th November, on which day the *ca. sa.* was returnable, offer the plaintiff's attorney to return into custody in discharge of the defendant's agreement, but the plaintiff's attorney refused to discharge the defendant from his agreement on those terms, and he on the same day offered to surrender himself to the under-sheriff, who refused to receive him.

This case was twice argued: first, in Michaelmas Term, by *Moore* for the plaintiff, and *Minchin* for the defendant; and now in this term by *Gaselee* for the plaintiff, and *Bayly* for the defendant.

When the case was called on the second time, the Court said that it was unnecessary to hear *Gaselee* on the case of Wain *v.* Warlters,[1] inasmuch as it appeared to them that the plaintiff, by agreeing to let Chase junior out of custody, had entirely discharged the debt as to him; and then the case would be, that the defendant promised to pay a certain sum of money, in consideration of the debt between the plaintiff and Chase junior being put an end to: which being a detriment to the plaintiff, would be a good consideration for an original promise, and take the question entirely out of the Statute of Frauds.

Lord Ellenborough, C. J. By the discharge of Chase junior with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held quite sufficient. Then, if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase junior. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the fourth section of the Statute of Frauds. *Judgment for the plaintiff.*[2]

[1] 5 East, 10.

[2] Butcher *v.* Stewart, 11 M. & W. 857; Cowenhoven *v.* Howell, 36 N. J. 323 (*semble*); Mercein *v.* Andrews, 10 Wend. 461 (as explained in Mallory *v.* Gillet, 21 N. Y. 412, 424); Cooper *v.* Chambers, 4 Dev. 261, *Accord.*

See also, Griffin *v.* Derby, 5 Me. 476. — Ed.

Hexter v Blanchard

Δ's son, a minor, hired horses of Π, not necessaries. Son got sick & Π kept demanding $. Δ promised that he would pay Π's bill if Π would not trouble son further. Π refrained; son died, & Π sues. Verdict for Δ below, case being held within the statute of frauds.

Sup Ct affirmed this; there was a debt of the son, even tho it was void. Here Δ's promise to pay for the debt of another, & since it was oral, cannot be enforced.

Ct hobbled on lack of consideration that the promise is original if it can't show [illegible] could be raised liability.

no novation here because no consideration. How about courts test, of advantage received by Δ that the promise is an original undertaking?

Goodman v [illegible]

Δ's son owed Π a debt, & was taken into custody on a ca sa. Π agreed to let him go free, if Δ would promise to put son in sheriff's custody on a certain date, & in default of this, to pay damages & costs of suit. Δ signed it, & son was not put in custody on that day. Suit for damages.

It gave judgment for Π. Son's debt was discharged by the discharge of son by Π's consent. Then the Δ's obligation is original & not collateral. Judgment for Π.

Why any ? ? P ? F rands /

Bird v Gammon

Π). creditor of Lloyd & had taken out execution. He did not realize & late Lloyd assigned all to Δ in trust for himself to pay debts. Account was stated between Π & Δ when Π relinquished his execution — Lloyd & agreed to look only to Δ. Objection was Statute of Frauds.

Tindal C.J. overruled this objection & gave judgment for Π. This is a novation & is a new promise of Δ's in consideration of Π's giving up his rights against Lloyd.

BIRD *v.* GAMMON.

In the Common Pleas, June 9, 1837.

[*Reported in* 3 *Bingham, New Cases*, 883.]

Tindal, C. J.[1] The facts are, that the plaintiff was a creditor of Lloyd's for £340 6*s.* 10*d.*, for which amount he held a warrant of attorney. Lloyd becoming embarrassed, the plaintiff signed judgment and sued out execution; and other creditors had similar claims upon Lloyd; the defendant then on behalf of Lloyd endeavored to make terms, and offered the plaintiff 10*s.* in the pound; but the plaintiff refusing to accede, the defendant looked accurately into Lloyd's accounts in March, 1829, and, among other debts, became apprised of the amount of this which was due to the plaintiff. Then, in May, 1829, Lloyd conveys all his property to the defendant to his own use, the defendant undertaking to pay Lloyd's creditors. Matters go on in this way for some years, Lloyd acting as bailiff to the defendant, when in May, 1832, an account is stated between the plaintiff and the defendant, the first item of which is this sum of £340 6*s.* 10*d.*; the aggregate total is cast up in the handwriting of the defendant, who makes no objection, but says, "all these sums we owe to Bird." It appears then that the plaintiff, with the consent of Lloyd and the defendant, had relinquished his execution against Lloyd, to look to the defendant; that the defendant admitted his liability when the account was presented; and that the jury found such to have been the agreement between the parties. No objection, therefore, can be raised on the Statute of Frauds, for this is not an agreement to pay the debt of a third person; but an agreement that if the plaintiff would forego his claim on Lloyd, the defendant would pay the amount of the debt on his own account. The case, therefore, falls within the principle of Read, Executor of Tuack, *v.* Nash, where a cause being at issue, the record entered, and just coming on to be tried, the defendant Nash being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, promised to pay Tuack £50 and the costs in that suit to be taxed till the time of withdrawing the record. Tuack relying upon this promise did withdraw his record, and no further proceeding was had in that cause; Tuack being dead, Read, his executor, brought his action upon that special promise and undertaking by Nash; and it was held that this was no promise to answer for the debt, default, or miscarriage of another; but an original promise sufficient to found an *assumpsit* upon against Nash.

It is objected that the plaintiff, if he fails in this action, may still sue Lloyd, or issue execution; but if he were to do so, Lloyd might show,

[1] Everything is omitted except the opinions of Tindal, C. J., and Coltman, J Park and Vaughan, JJ., delivered short concurring opinions. — Ed.

on plea or *audita querela*, that on good consideration the plaintiff gave up his remedy against Lloyd, and took the defendant's liability instead; which, though not properly accord and satisfaction, would be a complete defence on the general issue; Good *v.* Cheeseman, and the cases there cited. I think, therefore, this rule must be discharged.

COLTMAN, J. As to the £340 6*s.* 10*d.*, there is no difficulty: if debtor, creditor, and a third party agree that the third party shall be substituted for the debtor, the debtor is exonerated. Fairlie *v.* Denton,[1] has decided that, establishing to that extent an exception to the rule, that debts cannot be assigned. If the plaintiff had sued Lloyd, or issued execution, he would have had a good answer by plea or *audita querela*; Good *v.* Cheeseman. *Rule discharged.*[2]

[1] 8 B. & C. 395.

[2] Browning *v.* Stallard, 5 Taunt. 450; Tomlinson *v.* Gell, 6 A. & E. 564 (*semble*); Ex parte Lane, De Gex, 300; Gull *v.* Lindsay, 4 Ex. 45, 52; Thornton *v.* Guice, 73 Ala. 321; Carlisle *v.* Campbell, 76 Ala. 247; McLaren *v.* Hutchinson, 22 Cal. 187; Welch *v.* Kenny, 49 Cal. 49; Packer *v.* Benton, 35 Conn. 343; Buchanan *v.* Moran, 62 Conn. 83; Karr *v.* Porter, 4 Houst. 297; Harris *v.* Young, 40 Ga. 65; Anderson *v.* Whitehead, 55 Ga. 277; Howell *v.* Field, 70 Ga. 592; Sapp *v.* Faircloth, 70 Ga. 690; Casey *v.* Miller (Idaho, 1893), 32 Pac. R. 195; Corbin *v.* McChesney, 26 Ill. 231; Runde *v.* Runde, 59 Ill. 98; Struble *v.* Hake, 14 Ill. Ap. 546; Lindley *v.* Simpson, 45 Ill. Ap. 648; Nelson *v.* Hardy, 7 Ind. 364; Hopkins *v.* Carr, 31 Ind. 260; Bowen *v.* Kurtz, 37 Iowa, 239; Lester *v.* Bowman, 39 Iowa, 611; Brant *v.* Johnson, 46 Kas. 389 (*semble*); Armstrong *v.* Flora, 3 Mon. (Ky.) 43; Jones *v.* Walker, 13 B. Mon. 356 (*semble*); Day *v.* Chloe, 4 Bush, 563; Whitman *v.* Wentworth, 76 Maine, 20; Andre *v.* Bodman, 13 Md. 241 (*semble*); White *v.* Solomonsky, 30 Md. 585; Webster *v.* LeCompte, 74 Md. 249; Walker *v.* Penniman, 8 Gray, 233; Wood *v.* Corcoran, 1 All. 405; Lord *v.* Davison, 3 All. 131; Langdon *v.* Hughes, 107 Mass. 272; Eden *v.* Chaffee, 160 Mass. 225; Mulcrone *v.* American Co., 55 Mich. 622; Yale *v.* Edgerton, 14 Minn. 194; Wilson *v.* Vass, 54 Mo. Ap. 221; Watson *v.* Randall, 20 Wend. 201 (*semble*); Meriden Co. *v.* Zingsen, 48 N. Y. 247; Booth *v.* Eighmie, 60 N. Y. 238; Quintard *v.* DeWolf, 34 Barb. 97; Stanly *v.* Hendricks, 13 Ired. 86 (*semble*;) Estabrook *v.* Gebhart, 32 Oh. St. 415; Miller *v.* Lynch, 17 Oreg. 61; Allshouse *v.* Ramsay, 6 Whart. 331 (*semble*); Corbett *v.* Cochran, 3 Hill (S. C.), 41; Bason *v.* Hughart, 2 Tex. 476; Warren *v.* Smith, 24 Tex. 484; McCrary *v.* Van Hook, 35 Tex. 631; Anderson *v.* Davis, 9 Vt. 136; Watson *v.* Jacobs, 29 Vt. 169; Buchanan *v.* Paddleford, 43 Vt. 64 (*semble*); Bates *v.* Sabin, 64 Vt 511; Waggoner *v.* Gray, 2 Hen. & Munf. 603 (*semble*); Noyes *v.* Humphreys, 11 Grat. 636 (*semble*); Willard *v.* Bosshard, 68 Wis. 454 (*semble*); Rietzloff *v.* Glover (Wisconsin, 1895), 64 N. W. R. 298, *Accord.*

In the cases cited in the preceding paragraph the novation was effected by the substitution of a new debtor in the place of the original debtor (*novatio debiti*). If the novation is accomplished by a change of creditors, the debtor remaining the same, (*novatio nominis*) the promise of the debtor to pay his old debt to the new creditor is obviously not within the Statute of Frauds. Lacy *v.* McNeile, 4 D. & Ry. 7; Aultman *v.* Fletcher (Ala. 1895), 18 So. R. 215; Gallagher *v.* Nichols, 60 N. Y. 438; Van Wagner *v.* Terrett, 27 Barb. 181. — EN.

Tomlinson v Gill

Δ promised widow, that if he would be joined as Admr, he would make good a deficiency of assets. He was joined: this is bill by creditors for satisfaction of claims. Δ claimed it was within statute of Frauds.

Lord Hardwicke gave judgment for Π. This is not a [illegible] action of [illegible] (not admr) [illegible]. It is not a promise to answer debt of another, there is on a new consideration.

(Other remedy is in equity [illegible] at law, action > [illegible] L. J made > widow, et at. go to the [illegible] [illegible].

Isn't this really a promise to pay debts of another? If estate does not pay all debts, & he agrees to pay balance, it would seem to be such a promise. This case seems rather to go the old notion that if P was not liable, obligation of S was primary.

TOMLINSON *v.* GILL.

IN CHANCERY, BEFORE LORD HARDWICKE, C., NOVEMBER 15, 1756.

[*Reported in Ambler*, 330.]

THE defendant Gill promised, that if the widow of the intestate —— would permit him to be joined with her in the letters of administration of his assets, he would make good any deficiency of assets to discharge the intestate's debts.

Bill by creditors of the intestate against Gill, for a satisfaction of their debts, and performance of the promise. It was insisted, on the part of the defendant, to be within the Statute of Frauds and Perjuries; and that the promise, not being in writing, was void by that statute.

LORD HARDWICKE, Chancellor. There are two questions: 1st, On the right; 2d, On the remedy. The bill is founded on an argument, which is not unusual where there is a contest about obtaining administration. It is not uncommon, upon such occasions, for the simple contract creditors to agree that administration shall be granted to a specialty creditor, upon terms of his agreeing to pay the debts equally and *pari passu*. Such agreements are seldom put into writing.

I am of opinion this case is not within the Statute of Frauds. It is not within the first branch of the section, for Gill was not administrator at the time of making the promise; and it is no answer to say that he was administrator afterwards. It is not within the second branch of that clause, — the modern determinations have made a distinction between a promise to pay the original debt, on the foot of the original contract, and where it is on a new consideration. The distinction taken in Buckmire *v.* Darnell is a very slight and cobweb distinction. The judges were much divided upon the question. I agree with the many.

Here is quite a new, distinct consideration. Read *v.* Nash is strong to the purpose.

2d Question. The plaintiff is proper for relief here for two reasons: 1st, He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them. 2dly, The bill is brought for an account, and that draws to it relief, like the common case of a bill to be paid a debt out of assets. It was at first doubted whether the Court should go further than to take the account; but it was afterwards settled that the Court ought not to make two suits out of one, but give complete satisfaction on such a bill, by decreeing the debt to be paid.

EASTWOOD v. KENYON.

In the Queen's Bench, Hilary Term, 1840.

[*Reported in* 11 *Adolphus and Ellis*, 438.]

In this term (January 16th) the judgment of the Court was delivered by

Lord Denman, C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person."[1] Upon the hearing we decided, in conformity with the case of Buttemere *v.* Hayes,[2] that this defence might be set up under the plea of *non-assumpsit*.[3]

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.[4]

Rule to enter verdict for defendant discharged.

[1] Everything is omitted except the opinion of the Court upon this point. — Ed.

[2] 5 Mee. & W. 456.

[3] The Statute of Frauds is now an affirmative defence in England and most of the States in this country. — Ed.

[4] Pratt *v.* Bucklin, 22 Conn. 317; Tuttle *v.* Armstead, 53 Conn. 175; Meyer *v.* Hartman, 72 Ill. 442; Neagle *v.* Kelly, 146 Ill. 460; 44 Ill. Ap. 234; Crim *v.* Fitch, 53 Ind. 214; Bateman *v.* Butler, 124 Ind. 223; Patton *v.* Mills, 21 Kas. 163; Colt *v.* Root, 17 Mass. 229; Hubon *v.* Park, 116 Mass. 541; Pratt *v.* Bates, 40 Mich. 37; Goetz *v.* Foss, 14 Minn. 265; Ware *v.* Allen, 64 Miss. 545; Howard *v.* Coshow, 33 Mo. 118; Fisk *v.* McGregory, 34 N. H. 414; Merserean *v.* Lewis, 25 Wend. 243; Smart *v.* Smart, 97 N. Y. 559; Rice *v.* Cooke, 11 Ired. 298; Soule *v.* Albee, 31 Vt. 142; Randall *v.* Kelsey, 46 Vt. 158, *Accord*.

In the preceding cases the promise was made to the debtor. The promise is equally clear of the Statute of Frauds if made to one who is neither debtor nor creditor, as, in Reader *v.* Kingham, 13 C. B. N. S. 344, where the defendant, in consideration that the plaintiff, a bailiff, would forbear to arrest a judgment debtor, promised the bailiff to pay the debt to the judgment creditor. See also Thomas *v.* Welles, 1 Root, 57. — Ed.

Eastwood v Lyon

π owed debt to one B, & promised π that he would pay it, but did not & he is now sued in assumpsit.

Sherman, C.J., held that debt would not lie in such a case, & that it only arose to cases where no promise is made to person to whom another is bound, & it to such cases as this, but promise was made to letter.

FURBISH AND ANOTHER v. P. GOODNOW.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1867.

[*Reported in* 98 *Massachusetts Reports*, 296.]

CONTRACT on a promise by the defendant to pay the amount of a promissory note due to the plaintiffs from Charles Redding.

At the trial in the Superior Court, before RUSSELL, J., the plaintiffs relied upon the case stated in their declaration; namely, that Redding was indebted to them on a promissory note which they continued to hold; and that, by an agreed arrangement between the defendant, Redding, and the plaintiffs, Redding conveyed certain real estate to the defendant, and, as a part of the consideration therefor, the defendant promised to pay the plaintiffs the amount of the note. The plaintiffs admitted that they had no written evidence of any promise by the defendant, whereupon the judge, on motion of the defendant, ruled that without such written evidence, and without evidence that Redding was to be discharged from his obligation to pay the plaintiffs, this action could not be maintained; and a verdict was accordingly taken for the defendant. The plaintiffs alleged exceptions.

G. W. Park, for the plaintiffs.[1]

R. D. Smith (*H. L. Hazelton* with him), for the defendant.

GRAY, J. This case arises under that clause of the Statute of Frauds which provides that no action shall be brought "to charge a person upon a special promise to answer for the debt, default, or misdoings of another, unless the promise or some memorandum or note thereof is in writing, and signed by the party to be charged, or his agent." Gen. Stats. c. 105, § 1, cl. 2. By the established construction of this clause, "a special promise," in order to fall within the statute, must be express and not merely implied by law, "to answer for a debt," for which the promisor's person or estate is not already liable, "of another" than either of the parties to the promise, and who, if already liable for the debt, continues so liable. Goodwin *v.* Gilbert,[2] Fish *v.* Thomas,[3] Alger *v.* Scoville,[4] Walker *v.* Penniman.[5]

Even when all these elements concur, still, if the principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another. It must, however, be constantly borne in mind that the question under the statute is not whether there is a sufficient consideration for the defendant's promise, but whether that promise is to answer for the debt of another. The

[1] The argument for plaintiffs is omitted. — ED.

[2] 9 Mass. 514.

[3] 5 Gray, 45.

[4] 1 Gray, 395.

[5] 8 Gray, 233.

common law requires a consideration for every promise, oral or written; the statute also requires that, if it is a promise to answer for the debt of another, it shall be in writing. When the original debtor remains liable, yet if the creditor, in consideration of the new promise, releases some interest or advantage relating to or affecting the original debt, and enuring to the benefit of the new promisor, his promise is considered as a promise to answer for his own debt, and the case is not within the statute. But if no consideration moves from the creditor to the new promisor, and the original debtor still remains liable for the debt, the fact that the promisee gives up something to that debtor, or that a transfer of property is made or other consideration moves from that debtor to the new promisor to induce the latter to make the new promise, does not make this promise the less a promise to answer for the debt of another; but, on the contrary, the fact that the only new consideration either enures to the benefit of that other person, or is paid by him to the new promisor, shows that the object of the new promise is to answer for his debt. This is well settled in Massachusetts by the judgments of this Court, delivered by Chief Justice Shaw.

In Nelson v. Boynton,[1] it was held that a promise to pay the debt of another (which had been secured by suit and attachment of his property, in which the new promisor had no interest), in consideration of the creditor's discontinuing the suit, without, however, giving up or discharging that debt, was within the statute; and the Chief Justice distinguished the case from those in which the creditor had a claim or lien upon property, which was discharged at the request and for the benefit of the party promising; and said, "The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but when the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

The rule is more precisely defined in the latter case of Curtis v. Brown,[2] which cannot be distinguished from the present (at least in any particular favorable to this plaintiff) and which is conclusive upon the point that a consideration moving from the original debtor to the new promisor is not sufficient to take the case out of the statute. The plaintiff there offered to show that the defendants, owning land on which one Coffin was building houses under a contract, proposed to Coffin to release them from the building contract and assign to them the building materials then on the premises, which Coffin refused to do unless the defendants would agree to pay all bills then outstanding for labor and materials, the amount of which he mentioned, and of which the plaintiff's was one; that the defendants thereupon, in consideration of such a release and assignment, and with the sole mo-

[1] 3 Met. 396. [2] 5 Cush. 488.

tive of procuring that benefit, which they did not before enjoy, agreed to pay those bills; told Coffin to inform the creditors of the agreement, which he did; and took possession of the land and materials. It was held that the promise made by the defendants to Coffin, and communicated by him at their request to the plaintiff, was equivalent to a direct promise by the defendants to the plaintiff; but was within the Statute of Frauds and would not support an action, because, in the words of the Chief Justice, "where the original debt still subsists, and where the plaintiff has relinquished no interest or advantage, which has enured to the benefit of the defendant, it is not an original contract, but a contract to pay another's debt, and must be in writing;" and, in the particular case, "the promise of the defendants, supposing it to have been made directly to the plaintiff, was a promise to pay the debt due to him from Coffin; the plaintiff did not release Coffin, or relinquish any lien or benefit; and, although there was a good consideration in law for the defendant's promise, it was a consideration moving from Coffin, and not from the plaintiff."

The later decisions of this Court, cited in behalf of the plaintiffs, contain nothing to vary this rule. In Alger *v.* Scoville,[1] the plaintiff transferred to the defendant the greater part of the stock in a corporation, and the defendant received it and agreed to indemnify the plaintiff against his indorsements on the outstanding notes of the corporation; so that not only was the defendant's promise a promise to pay the debt of the promisee, but the consideration for it was a transfer of property from the promisee to the promisor; and Chief Justice Shaw cited with approval Nelson *v.* Boynton, and Curtis *v.* Brown, above quoted. See also Jepherson *v.* Hunt,[2] Dexter *v.* Blanchard, Burr *v.* Wilcox.[3] In Wood *v.* Corcoran,[4] the original debtor was released at the time of the new promise.

In England, the settled construction of the statute seems to be in accordance with that which has prevailed in this court. The rule was laid down by Sergeant Williams in the notes to Forth *v.* Stanton,[5] as the result of the earlier authorities, that "the question, whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." This proposition has since been considered as stating the true test. Green *v.* Creswell. In Fitzgerald *v.* Dressler,[6] Lord Chief Justice Cockburn (with whom the other judges agreed on this point) said of it, "I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself

[1] 1 Gray, 391.
[2] 2 Allen, 423.
[3] 13 Allen, 269.
[4] 1 Allen, 405
[5] 1 Saund. (5th ed.) 211 *e*.
[6] 7 C. B. N. S. 392.

the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property — it being, as I think, truly stated there as the result of the authorities, that, if there be something more than a mere understanding to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest, the case is not within the provision of the statute." In Tomlinson *v.* Gell,[1] Mr. Justice Patteson said, according to one report, "In the cases in which it has been held that the promise to pay the debt of another need not be in writing, some sacrifice has been made by the plaintiff, such as giving up a lien, or the original debt;" or, according to the other report, "The cases on that point have been where something has been given up by the plaintiff and acquired by the party making the promise; as the security of goods for a debt." In a very recent case, the plaintiff had contracted to supply a firm with goods, to be paid for on delivery. It was afterwards agreed between that firm, the plaintiff, and the broker who made this contract in behalf of that firm, and who had no interest in its performance, that the plaintiff, instead of receiving payment in cash, should draw upon that firm at one month, and allow the broker three per cent upon the amount of the invoice, in consideration of which the broker was to pay the plaintiff cash, and take the draft without recourse, or, in other words, buy the draft of the plaintiff. It was argued that this was an original contract by the broker, in consideration of the advantages which would accrue to him from the performance of the plaintiff's contract with the firm. But it was held by the Courts of Common Pleas and Exchequer Chamber that it was a promise to answer for the debt of the firm, and within the Statute of Frauds. Mallet *v.* Bateman. The other English cases cited by the plaintiff do not touch this point; for in Browning *v.* Stallard,[2] the new promise was accepted by the creditor as a substitute for the original one, and the first debtor discharged from liability; and in Hodgson *v.* Anderson,[3] the new promise was to pay to the plaintiff the promisor's own debt to a third person.

There is a want of consistency in the American authorities upon this subject. Chancellor Kent was of opinion that a guaranty of a previously existing debt of another was within the statute, unless it arose out of some new and original consideration of benefit or harm moving between the newly contracting parties. Leonard *v.* Vredenburgh.[4] In Jackson *v.* Rayner,[5] the Supreme Court of New York held that an oral promise, which a father, who had taken an assignment of his son's property, made to one of his son's creditors to pay his debt, was within

[1] 1 Nev. & P. 594, and 6 Ad. & El. 571.
[2] 5 Taunt. 450. [3] 3 B. & C. 842, and 5 D. & R. 735.
[4] 8 Johns. 39; 3 Kent Com. (6th ed.) 123.
[5] 12 Johns. 291.

Furbish v Goodnow,

Π's held promissory note of one Redding. By arrangement Redding agreed to transfer property to Δ, & as part ⁊ ꝯ/ Δ promised to pay Π's debt. No written instrument, & court gave non suit, exceptions by Π.

Gray J, held that this was a sufficient promise within the statute, & hence no recovery could be had & judgment for Δ. Test is whether the original debtor is discharged from liability & consideration moves from creditor to new promisor; if no case is taken out of statute, & it did not take place in fact it is within the statute as being collateral & original promise of debt of another. (section on p. 33 & 34, ℣) that fact that debtor gives new promise or consideration makes no difference.

But isn't test ⟨ ℣ ⟩ et really ⟨ b ⟩ - novation / i.e. whether there is a novation or not.

the statute. The decision of this Court in Curtis *v.* Brown, above cited, has been followed in Clapp *v.* Lawton,[1] and recognized in Robinson *v.* Gilman.[2] And the decision in Emerson *v.* Slater,[3] is not opposed to it; for in that case the promise of the defendant was an original undertaking on a good and valid consideration moving from the plaintiff to the defendant.

The other cases cited for the plaintiff indeed show that by the later decisions in New York, Maine, and Vermont, the application of the statute has been so far relaxed in those States as to treat a transfer of property from the original debtor to the new promisor as taking the promise of the latter to the original creditor out of the statute. But where the authorities are conflicting, it is important that this Court should follow its own decisions, unless clearly satisfied that they are erroneous, and thus at least preserve uniformity in the law of this Commonwealth.

In this action, brought upon an express promise of the defendant to pay the debt of a third person to the plaintiff, no evidence being offered of a discharge of the original debtor, or of any consideration whatever moving between the creditor and the new promisor, but the only consideration being a conveyance of real estate to the latter from the original debtor, the new promise was, according to the weight of authority, and in our opinion, on principle, a promise to answer for the debt of another, within the statute, and the action cannot be maintained. *Exceptions overruled.*[4]

BARKER *v.* GEORGE R. BUCKLIN.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1846.

[*Reported in* 2 *Denio*, 45.]

By the Court, JEWETT, J.[5] The case at bar is a parallel case with Farley *v.* Cleveland,[6] so far as the principle upon which the plaintiff's claim and defendant's liability rest. The defendant, as appears by the evidence of Francis B. Bucklin, purchased of the witness a pair of horses at the price of $160, which he agreed to pay to the plaintiff

[1] 31 Conn. 95. [2] 43 N. H. 491. [3] 22 How. 28.

[4] Clapp *v.* Lawton, 31 Conn. 95; Curtis *v.* Brown, 5 Cush. 488; Brightman *v.* Hicks, 108 Mass. 246; Brown *v.* Hazen, 11 Mich. 219; Halsted *v.* Francis, 31 Mich. 113; Shoemaker *v.* King, 40 Pa. 107; 1 Pearson, 206, s. c.; Maule *v.* Bucknell, 50 Pa. 53. (But see Townsend *v.* Long, 77 Pa. 143; Taylor *v.* Preston, 79 Pa. 436; Fehlinger *v.* Wood, 134 Pa. 517), *Accord.* — ED.

[5] Everything is omitted except the opinion of the Court upon the point of the Statute of Frauds. — ED.

[6] 4 Cow. 432; 9 Cow. 639.

to be applied upon a debt owing by the witness to him, involving, as I think, no question under the Statute of Frauds, but merely the question whether, where one person makes a promise to another for the benefit of a third, the third may maintain an action upon it, though the consideration does not move from him.

In Ellwood *v.* Monk,[1] the question arose on demurrer. The case made by the second special count of the declaration was this: The plaintiff was the payee and holder of three notes made by one Johannes Monk, each for a quantity of hemlock boards, dated in November, 1819, and payable in January, 1822, 1823, and 1824. On the 1st of January, 1823, the defendant, Jacob Monk, in consideration that Johannes Monk then gave and delivered to him a large portion of property of great value, to wit, of the value of five hundred dollars, undertook and promised to pay among certain creditors named of said Johannes, the said demand of the plaintiff arising upon said notes, averring that the plaintiff's demand against Johannes was three hundred dollars, and that he, confiding in the defendant's promise, stayed all proceedings and the collection of his debt against Johannes. The Court held that the contract set forth was obligatory upon the defendant, without being reduced to writing. It was said, however, that "the promise was to pay the debt of a third person, but yet it is not within the Statute of Frauds, being made upon a new and distinct consideration," citing Farley *v.* Cleveland as authority for that principle. I agree that the case was well decided; but, as I think, a wrong reason was given for it. It is difficult, it seems to me, to hold that a particular promise is to pay the debt of a third person and obligatory on the promisor, and not within the provisions of the Statute of Frauds, although not in writing, because it is founded upon a new and distinct consideration. The idea of the necessity of a new consideration to uphold a promise of one person to pay another's debt, I apprehend is only applicable to such promise made in a negotiation between the creditor and such person proposing to pay the debt of another to the creditor; there it is well settled that a promise by such person even in writing to pay a debt already incurred, is not available if there be no new consideration (Chitty, jun. on Contracts, ed. of 1842, p. 52; Leonard *v.* Vredenburgh.)[2] And where there is a new consideration for a promise by one to pay the debt of another, the promise is void by the provisions of the statute, unless the agreement, or some note or memorandum thereof expressing the consideration shall be in writing. An agreement on the part of a creditor to forbear to sue a debtor, is a good consideration to uphold a promise of a third person to pay the debt; so undoubtedly a like promise to a creditor in consideration of the transfer by the creditor to the promisor of property would be available to the creditor, if such agreement should be in writing as provided by the statute; but otherwise the agreement would be void, notwithstand-

[1] 5 Wend. 235. [2] 8 Johns. 29.

ing the new and distinct consideration for such promise. To constitute a valid agreement to pay the debt of another, therefore, there must be not only a good consideration, but the agreement must be in writing and must express the consideration. Both ingredients must concur, or the agreement will be void.

There cannot be any objection arising under the statute to the enforcing a promise made upon good consideration, by a third person to a debtor, to pay his creditor a specified debt, although such agreement is not in writing. The statute does not embrace such agreement, but only an agreement by which one party promises the other to answer for the debt, &c. of another person. A special promise made by A to B to pay the debt of the latter to C, the creditor of B, is not within the terms or meaning of the Statute of Frauds, and therefore need not be in writing to be valid. And I think it may be laid down as a rule admitting of no exception, that when a promise is made to a creditor by a third person to answer for the debt, &c. of the debtor, another person, it cannot be upheld, although founded upon a new consideration from the creditor, unless the agreement between the creditor and such third person shall be in writing; and that no agreement made between a debtor and a third person by which the latter promises upon sufficient consideration to pay a debt owing by the former to his creditor, is within the statute, whether in writing or by parol. In Ellwood v. Monk there was a good consideration advanced by Johannes Monk, the debtor of Ellwood, to Jacob Monk the defendant, to support his promise to pay his debt, and which Ellwood, for whose benefit the promise was made, had a legal right to enforce. And so in the case at bar, the defendant's promise I think was obligatory on him, whether in writing or by parol, and not within the Statute of Frauds. It was not a promise to answer for the debt of another person, but merely to pay the debt of the party making the promise to a particular person designated by him to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the Statute of Frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother of whom he purchased them.[1]

[1] Mason v. Hall, 30 Ala. 599; Locke v. Humphries, 60 Ala. 107; Coleman v. Hatcher, 77 Ala. 217; McLaren v. Hutchinson, 22 Cal. 187; Mulvany v. Gross, 1 Colo. Ap. 112; American Co. v. Wolfe, 30 Fla. 360; Wilson v. Bevans, 58 Ill. 232; Neagle v. Kelly, 146 Ill. 460; Scudder v. Carter, 43 Ill. Ap. 252; Wolke v. Fleming, 103 Ind. 105; Deering v. Armstrong (Ind. 1895), 42 N. E. R. 372; Poole v. Hintrager, 60 Iowa, 180; Plano Co. v. Burrows, 40 Kas. 361; Williams v. Rogers, 14 Bush, 776; Maxwell v. Haynes, 41 Me. 559; Watson v. Perrigo, 87 Me. 202; Calkins v. Chandler, 36 Mich. 320; Starika v. Greenwood, 28 Minn. 521; Holt v. Dollarhide, 61 Mo. 433; Green v. Estes, 82 Mo. 337; Keithley v. Pitman, 40 Mo. Ap. 596; Lee v. Newman, 55 Miss. 365; Clay v. Tyson, 19 Neb. 530; Wills v. Bank (Nevada, 1895), 42 Pac. R. 490; Berry v. Doremus, 30 N. J. 399; Gold v. Phillips, 10 Johns. 412; Farley v. Cleveland, 4 Cow. 432, 9 Cow. 639; Barker v. Bradley, 42 N. Y. 316; F. N. Bank v. Chalmers, 144 N. Y. 432; Moore v. Stovall, 2 Lea, 543 (overruling Campbell v. Findley, 3 Hum

The testimony however does not sustain either count in the declaration. The contract set out in each of the special counts is widely variant from the one proved.[1] The motion to set aside the nonsuit must therefore be denied. *New trial denied.*

DOCK v. BOYD & CO.

IN THE SUPREME COURT, PENNSYLVANIA, JANUARY 12, 1880.

[*Reported in* 93 *Pennsylvania Reports*, 92.]

JANUARY 12th, 1880. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, and TRUNKEY, JJ. STERRETT and GREEN, JJ., absent.

Error to the Court of Common Pleas, No. 1, of Philadelphia County: Of January Term, 1879, No. 118.

Case by William S. Boyd and Charles S. Boyd, trading as William S. Boyd & Co., against Luther Dock.

F. G. Miller, doing business as F. G. Miller & Co., owed the plaintiffs $1,428.11, partly on book account and partly on a note for $1,000 maturing November 29th, 1875. The plaintiffs drew on Miller & Co. for $428.11, the excess of their claim over the note, and the draft came back protested, whereupon the plaintiffs wrote to them, threatening legal proceedings. F. G. Miller & Co. sent the plaintiffs' letter to the defendant Dock, who was a joint owner with F. G. Miller, one of the firm of Miller & Co., and one Mitchell, of certain lumber lands on Lick Run, on which they carried on the lumber business in partnership. Dock, with plaintiffs' letter in his hands, went to their store, and, as they testified, though he in his evidence denied it, said that Miller had sent him the letter; that he, Dock, had come to intercede for them; that they were "in tight papers," and he did not want them pushed; that he had money or other property of theirs in his hands, and he would sell it and pay the plaintiffs; that he would not give his own note, but his word was as good as his bond; that he would not fix a

330); Lookout Co. v. Houston, 85 Tenn. 224; McCrary v. Van Hook, 35 Tex. 631; Morris v. Gaines, 82 Tex. 255; Fullam v. Adams, 37 Vt. 391; Keyes v. Allen, 65 Vt. 667; Wright v. Smith, 81 Va. 777 (*semble*); Silsby v. Frost, 3 Wash. T. 388; Hoile v. Bailey, 58 Wis. 434; Martin v. Davis, 80 Wis. 376, *Accord*.

In New Hampshire and Rhode Island the Statute of Frauds ceases to apply as soon as the creditor of A claims the benefit of the defendant's promise to A to pay the latter's debt, because, as it is said, such a claim by the creditor necessarily operates as a release of A and so effects a novation. Lang v. Henry, 54 N. H. 57; Wood v. Moriarty, 15 R. I. 518, 16 R. I. 202; Aldrich v. Carpenter, 160 Mass. 166, 170 (applying R. I. law). — ED.

[1] The counts alleged a promise to the plaintiff. The evidence showed a promise to Bucklin to pay to the plaintiff. — ED.

Hock v Boyd

Miller & Co owed money to Π, & Π threatened suit. Hock came in & induced Π's to hold off, stating that he had effects of Miller in his hands, which he would sell, & out of which he would see Π's paid. Π's agreed not to push; Miller absconded & Π's sue. Δ claimed that since obligation of Miller still existed, obligation of Δ was collateral & within statute of Frauds. Ct ruled otherwise & rendered judgment for Π.

Sup Ct affirmed this & held that is necessary is that the Δ should have property of debtor in his hands.

time for payment, which might be next week, or not for thirty or sixty days; that there was no danger of the property being taken out of his hands by other creditors, for he had it so fixed that that could not be done; that the plaintiffs were secure, and he would see them paid. Upon this, as the plaintiffs testified, they agreed not to push Miller without notifying Dock, and made a memorandum to that effect on the protested draft. Dock sent Miller $1,000 to take up his note for that amount to the plaintiffs, which matured on the 29th of November, 1875, and Miller received it, but did not pay plaintiff's note, and absconded. Plaintiffs subsequently sued Miller & Co. on their claims and got judgments.

It also appeared that Miller was largely indebted to Dock, but that Dock had in his hands lumber in which Miller was interested, which was taken from the above-mentioned tract of lumber land.

The third and fourth points of the defendant were as follows:

3. "The jury must upon the evidence find for the defendant, there being no sufficient evidence to show that defendant ever had in his hands property of Miller's, which, as between him and said Miller, he was bound to apply to the payment of his debt to the plaintiffs."

4. "If the jury find that, as between the plaintiffs and Miller, the liability of the latter was never given up or abandoned, but still remains existing and unaffected, the agreement of the defendant, as alleged by plaintiffs, was collateral to said liability of Miller, the Statute of Frauds, requiring a writing, applies, and the jury must find for defendant."

In answer to these points, the Court said: "If you believe Boyd & Co., although they did not abandon their claim, had been induced to give time to Mr. Miller through Mr. Dock's promise, it would be enough."

In the general charge, the Court, *inter alia*, said: "If Mr. Dock agreed to apply the means in his hands to the payment of Miller's debt, with Miller's acquiescence, he is bound by that agreement, and it is not necessary it should be in writing."

The verdict was for plaintiffs for $1,270.66, and after judgment thereon the defendant took this writ, and alleged that the Court erred in the answer to the points, and in the foregoing portion of the charge.

H. A. L. Pyle and *Chapman Biddle*, for plaintiff in error.

George Junkin, for defendants in error.[1]

The judgment of the Supreme Court was entered, January 26th, 1880.

PER CURIAM. That Dock had means in his hands belonging to Miller was in evidence, but if the contrary had appeared he would have been estopped by his own declarations, upon the faith of which his verbal promise to pay the debt was accepted. Such being the case, it was clearly not within the Statute of Frauds. When the promise is to apply the funds or property of the debtor in the hands of the party, it

[1] The arguments of counsel are omitted. — ED.

is not necessary that the creditor should give up his recourse against the debtor upon the original claim. The promise is not a collateral but an original one, founded on sufficient consideration.

Judgment affirmed.[1]

A. J. BELKNAP, APPELLANT, *v.* W. M. BENDER, RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1878.

[*Reported in* 75 *New York Reports*, 446.]

EARL, J.[2] In 1872, the plaintiff was engaged with his men and teams in managing a saw-mill for the firm of Ward & McVicker, and they were indebted to him, for labor performed, in the sum of $1,500, and were also largely indebted to the defendant and other parties. The defendant then, for the purpose of securing his debt, entered into the following agreement with the firm: —

"Agreement made 20th August, 1872.

"W. M. Bender hereby agrees with Ward & McVicker to take their mill, called Shedd's mill, to run the said mill, and to saw up their logs now lying in their log-yard, to ship the lumber and to sell the same, and to apply the proceeds thereof to the payment of the current expenses of sawing and shipping said lumber, and also to the payment of the judgment claims, amounting to $4,872.29, and the claim of said Bender, say $7,000, and the rent of mill, $1,000, now due, and the back wages of their hands, say $1,500, as stated in schedule annexed, and the balance, if any, to pay over to said Ward & McVicker, for the consideration of ten per cent on the amount of said sales; and the said Bender agrees, in case of any sale of said logs or lease of said mill, under any judgment, to buy the same and to hold them in order to carry out the true intent of this agreement, it being understood that

[1] It is everywhere agreed that the section of the Statute of Frauds relating to guaranties has no application in cases where the defendant has promised to pay the debt of A to B out of property put into his hands for that purpose. It is simply a case of trust. Andrews *v.* Smith, 2 C. M. & R. 627; Goddard *v.* Mockbee, 5 Cranch, C. C. 666; Hitchcock *v.* Lukens, 8 Port. (Ala.) 333; Woodruffe *v.* Scaife, 83 Ala. 152 (but doctrine misapplied, there being no trust-res); Hughes *v.* Lawson, 31 Ark. 613; Lucas *v.* Payne, 7 Cal. 92; Hamill *v.* Hall, 4 Colo. Ap. 290; Ledbetter *v.* McGhees, 84 Ga. 227; Prather *v.* Vineyard, 9 Ill. 40 (see also Power *v.* Rankin, 114 Ill. 52); Bott *v.* Barr, 95 Ind. 243; Hilton *v.* Dinsmore, 21 Me. 410 (*semble*); Mitts *v.* McMorran, 64 Mich. 664, 85 Mich. 94; Dilts *v.* Parke, 4 N. J. 219 (*semble*); Wyman *v.* Smith, 2 Sandf. 331; May *v.* Nat. Bank, 9 Hun, 108; Phelps *v.* Rowe, 75 Hun, 414; Draughan *v.* Bunting, 9 Ired. 10; Mason *v.* Wilson, 84 N. Ca. 51; Stoudt *v.* Hine, 45 Pa. 30; Smith *v.* Exchange Bank, 110 Pa. 508; Fehlinger *v.* Wood, 134 Pa. 517; Peck *v.* Goff, 18 R. I. 94; Fullam *v.* Adams, 37 Vt. 391 (*semble*).

See also Hedges *v.* Strong, 3 Oreg. 18. — ED.

[2] Only the opinion of the Court is given. — ED.

said Bender is only to pay said several claims as mentioned above from the proceeds of said lumber as aforesaid.

"BENDER, SON, & Co.
"WARD & MCVICKER."

To this agreement was annexed a schedule of the debts to be paid under the agreement, among which was the debt due the plaintiff.

In pursuance of this agreement, the defendant took possession of the mill, and the stock of logs and lumber on hand, and at the time of the commencement of this action had disposed of about half of the lumber.

This action is brought by plaintiff, not for an accounting under the agreement and to recover his share of the proceeds of the lumber, but to recover the whole sum due him from Ward & McVicker, upon the theory that defendant had absolutely promised to pay it to him.

Upon the trial the plaintiff testified that the defendant came to him and told him to keep on working at the mill, and he would pay him for his work at the same rate which Ward & McVicker had been paying him, and that he had bought the stock of Ward & McVicker, and had made an arrangement with them to pay him what was due him from them, and if he would keep on working for him he would pay him for his work, and in a day or two would pay him $1,000 upon the amount due him from Ward & McVicker; and he testified that he went on and worked for the defendant, but that the defendant had failed to pay him the amount due him from Ward & McVicker. The plaintiff recovered $1,000 and interest.

The promise of the plaintiff to work for the defendant at what appeared to be a full compensation did not furnish a consideration for defendant's promise to pay Ward & McVicker's debt. Pfeiffer *v.* Adler.[1] And the trial judge so held. But from plaintiff's evidence standing alone, it might have been inferred that defendant had purchased the saw-mill stock of Ward & McVicker, and had agreed with them to pay a portion of the purchase price to him in satisfaction of the debt due him from them; and in that case, under the rule laid down in Lawrence *v.* Fox,[2] and other similar cases, the plaintiff could have recovered. But at a later stage of the case, the written agreement between defendant and Ward & McVicker was proved, and that shows precisely what defendant agreed with them to do. Under that agreement he did not become personally liable to pay the plaintiff; he did not agree to pay plaintiff absolutely, or with his own funds. He did not purchase the stock; he simply agreed to saw the logs and market the lumber, and apply the net proceeds in payment of the debts specified. He incurred no personal liability for the debts, and was required only to be faithful in the discharge of the trust assumed.

The defendant could not become bound to pay to the plaintiff the

[1] 37 N. Y. 164. [2] 20 N. Y. 268.

debt due him from Ward & McVicker by any verbal promise made to him. Such a promise, to be binding within the Statute of Frauds, must be in writing, and founded upon a sufficient consideration passing between the parties. But if Bender had purchased lumber of Ward & McVicker, and thus become indebted to them, and in consideration thereof had agreed to pay a portion of his debt to the plaintiff in satisfaction of the amount due him from Ward & McVicker, such a promise, as stated above, would not have been within the Statute of Frauds. But the difficulty here is that there was no such debt to Ward & McVicker, and no such promise by the defendant. But the trial judge held that if the jury were satisfied that the defendant agreed to pay the $1,000, as testified to by plaintiff, the plaintiff could recover upon the theory that the property had been placed in the hands of the defendant for sale, and that he would be liable to pay the plaintiff after he had disposed of it, and hence that he could waive the delay and be bound by his promise to pay before he had realized the proceeds. And it is upon this theory in part that the plaintiff now seeks to uphold the recovery at the circuit.

The case, then, stands thus: The defendant, by his agreement with Ward & McVicker, was not personally bound to pay this debt. He was bound only to pay it out of the proceeds of the property when realized. The property was placed in his hands upon the consideration expressed in the paper, and he had it at the time of the alleged promise to the plaintiff. What consideration is there to uphold the promise? Clearly none. That promise, if valid, imposed upon him an entirely new obligation; it bound him to pay the $1,000 personally whether he realized sufficient to pay it from the sale of the lumber or not; it created a personal liability when none existed before. Such a promise to be valid, aside from the Statute of Frauds, must be based upon a consideration. The plaintiff furnished none, and the lumber which had been before placed in defendant's hands upon a different consideration furnished none. After this promise the defendant's interest in the lumber and control thereof were no greater than before.

But the counsel for the plaintiff strenuously contends that the promise of the defendant is without the Statute of Frauds, and founded upon a sufficient consideration, simply because Ward & McVicker placed in defendant's hands property upon trust to pay this debt; and there are some general expressions in reported cases which, literally taken, support this construction.

In Mallory *v.* Gillett, Judge Comstock says that when the debtor puts a fund into the hands of the promisor, either by absolute transfer or upon a trust to pay the debt, the promise to pay it is not within the Statute of Frauds. This general language needs some limitation or explanation. If the promise in such case be made to the debtor in consideration of the transfer, it is no doubt valid. If it be made to the creditor after it has become the duty of the promisor, under his arrangement with the debtor, to pay, then it is valid; as if in this case Bender

had converted the property into money, and then promised the plaintiff to pay the debt, he could have been sued directly on such promise. That would have been an original promise to discharge his own obligation to the plaintiff. As said by Judge Comstock in that case: "The law would imply an obligation on the defendant's part to pay over the money to the plaintiff after selling the goods; and when the law will imply a debt or duty against any man, his express promise to pay the same debt, or perform the same duty, must in its nature be original." Poland, C. J., in Fullam *v.* Adams,[1] after laying down the rule in substantially the same language as that used by Judge Comstock, says the true principle why the promise to the creditor in such a case is valid is, that "the party making the promise holds the funds of the debtor for the purpose of paying his debt; and as between him and the debtor it is his duty to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another." Throop, in his work on Verbal Agreements (vol. i. p. 535), lays down the rule as follows: "When the promisor absolutely controls the fund, but his application thereof to the payment of the debt due to the promisee will acquit him of a duty which he owed to the person who furnished it, the promise is not within the statute." Here the defendant owed Ward & McVicker no duty to pay the debt. The only duty he owed them was to convert the property and apply the proceeds upon the debts specified. When this action was commenced, he was not in any default in the discharge of that duty, and the action was not brought upon such a theory.

To test this case further. Suppose a voluntary assignee of an insolvent debtor after he had taken possession of the property assigned, but before he has converted it into money, and before the duty to pay has arisen, promises without any further or new consideration to pay the debt of one of the preferred creditors, could such a promise be enforced? Suppose one takes a conveyance of real estate from a debtor upon the agreement with him that he will rent it, and accumulate the rent for ten years, and then pay the net amount to his creditors, and the next day without any new consideration he promises at once to pay the creditors, could such a promise be enforced? These cases are analogous to the one in hand; and no authority — certainly no case, and that would be regarded as authority in this State — can be found which would authorize the enforcement of such promises. They would be void at common law as without any consideration, and void also under the Statute of Frauds as not in writing.[2]

[1] 37 Vt. 391.

[2] Jackson *v.* Rayner, 12 Johns. 291; Ackley *v.* Parmenter, 98 N. Y. 425; Homer *v.* Sidway, 124 N. Y. 538, 547 (*semble*); F. N. Bank *v.* Chalmers, 144 N. Y. 432, 434 (*semble*); Shaaber *v.* Bushong, 105 Pa. 514 (*semble*); McKenzie *v.* Nat. Bank, 9 Wash. 442, *Accord.*

Lippincott *v.* Ashfield, 4 Sandf. 611 (a promise to pay out of a special fund assigned by the debtor to the promisor, and that the fund should realize enough to pay the debt of the assignor), *Contra.* — Ed.

But we can go one step farther in this case. Even if the promise had been made after the defendant had converted the proceeds, it could have been enforced against him only to the extent of the proceeds applicable to this debt. Ardern *v.* Rowney.[1] If the amount applicable to this debt had been less than the $1,000, then for the excess of the debt the promise would have been without consideration. Defendant in such a case would have owed the duty to pay the plaintiff his share of the proceeds, and his promise to that extent would have been valid as one to discharge his own obligation. But his promise for more would, as to the excess, not have been to pay anything for which he was liable in any way, but to pay the debt of Ward & McVicker, and hence within the Statute of Frauds. Here the complaint was not framed, and the trial was not conducted for a recovery upon such a theory. There was no proof that the property was sufficient to pay the $1,000, but, on the contrary, the proof showed that it was not sufficient.

The plaintiff's counsel upon the argument claimed that the case of Young *v.* French[2] was very much in point in his favor. But in that case there was a new consideration for the promise sued on, moving from the plaintiff to the defendant, and hence that case is unlike this.

It is difficult to perceive how the doctrine of waiver can apply in a case like this. A person may waive some act or condition which another is to perform to or for him. He may choose to pay a debt before due; but in a legal sense he waives nothing by so doing. Here, however, there was no debt of the defendant, and he could not by such a waiver, if we call it such, based upon no consideration, impose upon himself an entirely new obligation.

It follows, therefore, that the order of the General Term must be affirmed, and judgment absolute rendered against the plaintiff, with costs.

All concur. *Order affirmed and judgment accordingly.*

* 1913 2 K B 99

HOWES *v.* MARTIN.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JULY 15, 1794.

[*Reported in* 1 *Espinasse*, 162.]

ASSUMPSIT for money laid out and expended, to the use of the defendant, with the common counts.

Plea of the general issue.

The circumstances of the case in evidence were, that the plaintiff and defendant having lived in habits of intimacy, the plaintiff had been induced, out of motives of friendship, and merely to accommodate the

[1] 5 Esp. 254. [2] 35 Wis. 111.

Belknap v Bender.

Ward & McVicker owed debts to Π & Δ. Δ's & W. & M. made agreement whereby Δ was to take over saw mill & logs, & sell them & apply proceeds to payment of expenses & wages etc due. Part of logs was sold, & now Π sues for wages due him, under Δ's contract. Verdict for Π below. & appeal.

Held that there was no consideration from Π to Δ to waive out Δ's promise to pay his debt or claim. Cumbe followed in Δ's favor. Moral consideration for the debt.

Howes v Martin

Assumpsit for money laid out to use of Δ. Π had accepted a bill for accomodation of Δ, & had been induced to defend the action on the bill on the ground of no consideration. Judgment had been given against her, & suit is for that sum.

It held that case was not within the statute, & that Π could recover.

defendant, to accept several bills of exchange on his account. These bills had all been regularly taken up, when they became payable by the defendant, except the last, which was for £20. This bill had come into the hands of one Greensill, and the defendant, being unable to take it up when due, had prevailed upon Greensill to accept £16 in part, and the plaintiff's acceptance for six guineas being the balance of the bill, with the interest then due for the remainder.

This bill for six guineas not being paid when due, Greensill brought his action on it against Howes the now plaintiff, as the acceptor, in the Court of Common Pleas. On the action being brought, the plaintiff acquainted Martin with the circumstance, and he desired the present plaintiff to defend the action, representing to her, that as she had never had any consideration for the acceptance, she might safely do it. In consequence of which representation she did defend the action, and Greensill the plaintiff in that action obtained a verdict against her for the amount of the bill, which with the costs amounted to £32. To recover which sum, the present action was brought.

Garrow, for the defendant, upon this evidence objected, that under the Statute of Frauds this action was not maintainable, inasmuch as there was no note in writing.[1]

Lord Kenyon overruled the objection, and held that the case was not within the Statute of Frauds. His Lordship said that in this case it appeared that the plaintiff never had any consideration whatever for her acceptances, which were given merely on the defendant's account and for his use; that the defence to the action on the note was on his account, and from whence he could have derived a benefit: that as he therefore was personally interested, and directed the defence to be made, by which he might have been benefited, that the money must be considered to have been laid out by the plaintiff on his account, and to his use, and that she therefore was entitled to recover it back from him.[2]

Erskine and *Espinasse*, for the plaintiff.

Garrow, for the defendant.

[1] The arguments of counsel are omitted. — Ed.

[2] Adams *v.* Dansey, 6 Bing. 506; Lerch *v.* Gallup, 67 Cal. 595; Marcy *v.* Crawford, 16 Conn. 549; Goodspeed *v.* Fuller, 46 Me. 141; Weld *v.* Nichols, 17 Pick. 538; Green *v.* Brookins, 23 Mich. 48; Allaire *v.* Onland, 2 Johns. Cas. 52; Evans *v.* Mason, 1 Lea, 26; Dorwin *v.* Smith, 35 Vt. 69; Hull *v.* Brown, 35 Wis. 652, *Accord.* — Ed.

W. THOMAS *v.* WILLIAM COOK.

IN THE KING'S BENCH, MICHAELMAS TERM, 1828.

[*Reported in* 8 *Barnewall and Cresswell*, 728.]

ASSUMPSIT. The declaration stated that on, &c., a certain partnership in trade between one W. Cook, since deceased, and one N. D. Morris, was dissolved; that it was agreed between W. Cook, since deceased, and Morris, that the former should take upon himself the payment of certain debts (specified in the declaration); and that it was also agreed that a bond of indemnity, executed by W. Cook, since deceased, and two other persons, should be given to Morris, to save him harmless from the payment of the said debts. And thereupon, afterwards, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would, together with the defendant and W. Cook, since deceased, execute a bond of indemnity to Morris in the sum of £4,100 conditioned to save him harmless from the said debts; the defendant undertook and promised the plaintiff that he, the defendant, would save harmless and indemnify him from all payments, damages, costs, and expenses which he (plaintiff) should or might incur, bear, pay, sustain, or be put unto by reason or means of his so executing the said writing obligatory. Averment, that plaintiff was afterwards compelled to pay on account of the said debts the sum of £360, and that defendant had not indemnified him. The second and third counts were in substance the same. The fourth count alleged, that in consideration that the plaintiff, at the request of the defendant, would, as surety for W. Cook, since deceased, together with the said W. Cook and the defendant, make and draw a certain bill of exchange for £500 upon certain persons (named), and would indorse and deliver the same to Morris, in order that he might negotiate the same for his own use, the defendant undertook to indemnify the plaintiff from any loss or damage by reason of his drawing and indorsing the bill. Averment, that plaintiff did draw and indorse the bill in manner aforesaid, and was afterwards by reason thereof compelled to pay it, whereof the defendant had notice, but did not indemnify him. Counts for money lent, paid, had, and received, and on an account stated. Plea, the general issue. At the trial before PARK, J., at the Hereford Lent assizes, 1828, it appeared that the plaintiff and defendant had executed the bond, and drawn the bill mentioned in the declaration; that the defendant had requested the plaintiff to do so, and promised that he should not be a loser. It was also proved, that on account of payments made by the plaintiff towards the debts specified, and the bill of exchange, a sum of £400 remained due to him in 1825. After this time the plaintiff received from the estate of W. Cook, since deceased, £100, leaving a deficiency of £300. For the defendant it was contended, that the plaintiff could not recover on the special counts for want of a writ-

Thomas v Cook

On dissolution of partnership between W. Cook & Morris, Cook was to undertake payment of debts, & was to give bond to Morris to that effect. D was one of the sureties, & induced T to be the other surety in consideration of his promise to save him harmless. T also indorsed a bill of exchange along with D under same promise. T had to pay both, & brot suit to recover balance due him, estate of W. Cook being insolvent.

It held that promise was within the Statute of Frauds, i.e. a promise to indemnify, was not within the statute.

Green v Cresswell

One Hadley was arrested for debt, at request of D, π gave a bail bond, conditioned on Hadley's putting in special bail. π alleged that ∆ promised that he would save harmless & indemnify π against any loss he might sustain, H. did not put in special bail, & π had to pay, & now he sues to recover.

Ct gave judgment for ∆, holding that ∆'s promise was within the statute of Frauds, as being a promise to answer for the default of another

of Defendants Thomas v Cook.

ten agreement, the promise there laid being to answer for the debt of a third person, and consequently that he could only recover against the defendant as co-surety on the count for money paid, one moiety of the £300. The learned judge directed the jury to find a verdict for the plaintiff for £300, and gave the defendant leave to move to reduce it to £150. A rule *nisi* for that purpose was obtained in last Easter Term, against which

Taunton and *Chilton* now showed cause.

Russell, Sergt., and *Curwood*, *contra*.[1]

BAYLEY, J. It is provided by the fourth section of the Statute of Frauds, that "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized." Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cooke, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds; and if so, there was sufficient evidence to entitle the plaintiff to a verdict for £300.

PARKE, J. This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought, therefore, to be discharged. *Rule discharged.*

GREEN v. CRESSWELL.

IN THE KING'S BENCH, JUNE 4, 1839.

[*Reported in* 10 *Adolphus & Ellis*, 453.]

ASSUMPSIT. The first count of the declaration stated that, on 2d February, 1836, a *capias*, directed to the sheriff of Warwickshire, issued from the Court of Exchequer against one Joseph Hadley, at the suit of one John Reay, which was indorsed for bail for £35, and was delivered to the sheriff, who, on the day and year aforesaid, arrested Hadley;

[1] The arguments are omitted, and the statement of the case is slightly abridged. — ED.

that afterwards, to wit, 9th February, 1836, in consideration that plaintiff, at the request of defendant, would become bail and surety for Hadley, and would, as such bail and surety, seal, and as his act and deed deliver to the said sheriff, a bail bond, conditioned for putting in special bail by Hadley, defendant then promised plaintiff that he, defendant, would save harmless and indemnify plaintiff from all payments, damages, costs, and expenses which he, plaintiff, should or might incur, bear, pay, sustain, or be put unto by reason or by means of so becoming bail and surety; that plaintiff, confiding, etc., did afterwards, to wit, on the day and year last aforesaid, at the request, etc., seal and deliver the bail bond, but that Hadley did not put in special bail, whereby the bond became forfeited; that afterwards, to wit, 15th February, 1836, the sheriff assigned the bail bond to Reay, who thereupon afterwards, to wit, on the day and year last aforesaid, sued the present plaintiff on the bond in the Court of Exchequer, and recovered judgment for £75 5*s.* damages and costs; and afterwards, to wit, 11th August, 1836, sued out execution by *fieri facias* against the now plaintiff, who was thereby compelled to pay £98 6*s.*; of all which defendant had notice. Breach, that defendant had not indemnified plaintiff, nor repaid him any of the £98 6*s.*, nor divers other sums expended for costs, etc., to wit, £50, etc.

Pleas. 1. *Non assumpsit.* Issue thereon.

2. The Statute of Frauds.

On the trial before PARK, J., at the Warwickshire Summer Assizes, 1837, evidence was given of the promise, as stated in the declaration; but no evidence was given of any writing. The learned judge was of opinion that the case was not within the Statute of Frauds; and a verdict was found for the plaintiff, on the replication to the second plea. In Michaelmas Term, 1837, *Goulburn*, Sergeant, obtained a rule for a new trial, or arrest of judgment.

Balguy now showed cause.

Goulburn, Sergt., and *Mellor*, *contra*.

LORD DENMAN, C. J., afterwards, in this term (June 11th), delivered the judgment of the Court. After stating the facts, his Lordship proceeded as follows: —

A motion has been made in arrest of judgment, the promise appearing by the plea not to have been in writing, and the replication only averring in answer that it was not a special promise to answer for the debt or default of another.

The promise in effect is, "If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him."

If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another. The case most relied on by the plaintiff is that of

Thomas *v.* Cook, where this Court held that a promise of B to hold A harmless against the consequences of his entering with B and C, at B's request, into a joint bond to indemnify D against debts due from C and D was binding, though not in writing; Bayley, J., and Parke, J., the only judges present, saying that a promise to indemnify does not fall within the words or policy of the statute. But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down, which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but, even in that shape, we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls.

Adams *v.* Dansey [1] does not bear out the general doctrine. That was a promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe. This is not becoming responsible for debt or default of any other, but merely promising to pay what the promisee may lose by defending the promisor's interests in a suit.

In some of the cases the language employed seems to assume that the debt, default, or miscarriage must have been incurred at the time of making the promise. But the common case of becoming responsible for goods supplied to another on the faith of that promise, and of course after it, shows that criterion to be inadmissible.

A distinction was also hinted at, from the circumstance of Hadley's debt being due to a third person, and the default therefore incurred towards him, not towards the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt, or surrendering?

There does not appear any objection to the test laid down in the note to 1 Williams's Saunders, 211 *c.*; and it is decisive in favor of the objection. The original party remained liable; and the defendant incurred no liability except from his promise.

Rule absolute for arresting the judgment. [2]

[1] 6 Bing. 506.

[2] In Cripps *v.* Hartnoll, 4 B. & S. 414 (reversing s. c. 2 B. & S. 29), Pollock, C. B., delivering the opinion of the Court, said (p. 419): "But there is a great distinction between that case [Green *v.* Cresswell] and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be. Now it has been laid down, that a mere promise of indemnity is not within the Statute of Frauds, and there are many cases which would exemplify the correctness of that decision. On the other hand, an undertaking to answer for the debt or default of another is within the Statute of Frauds, and no doubt some cases might be put where it is both the one and the other; that is to say, where the promise to answer for the debt or default of another would involve what might, very properly and legally, be called an indemnity. Where that is the case (which it is not here), in all probability

WILDES v. DUDLOW.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., DECEMBER 8, 9, 1874.

[*Reported in Law Reports*, 19 *Equity*, 198.]

THIS was a suit for the administration of the estate of John Dudlow, who died in 1854. The bill was filed in 1868 by legatee. The cause was heard in 1870, and the common administration decree was made. The estate proved insufficient to pay the legacies in full. Thereupon the plaintiffs took out a summons to vary the chief clerk's certificate by striking out a sum of £1,000, which John Noble Dudlow, the son and one of the executors of the testator, had been allowed to charge against the estate and retain under the following circumstances: —

In the year 1853, the testator, who had often assisted his son-in-law, Henry Atkinson Wildes, in raising money, requested his son, John Noble Dudlow, to join Henry Atkinson Wildes in a joint and several promissory note for £1,000, saying that he (the testator) did not like his (the testator's) name going so often to Randall & Co., from whom Henry Atkinson Wildes intended to raise the said sum, and offering to indemnify the said John Noble Dudlow from any loss that might arise from his joining in the said note. John Noble Dudlow was afterwards compelled to pay the said sum, and the chief clerk had allowed his claim in respect of such payment.[1]

Mr. Glasse, Q. C., and *Mr. Herbert Smith*, for the plaintiffs.

Mr. Higgins, Q. C., and *Mr. Grosvenor Woods*, for the defendant Dudlow.

SIR R. MALINS, V. C. The question is, whether this contract is, within the 4th section of the Statute of Frauds, required to be in writing. The words of that clause are, "charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another." What was the promise made by the testator in this case to the defendant John Dudlow? It was not, "I engage with you to be answerable to you for the debt of Wildes," because Wildes did not owe Dudlow anything, but he says, "If you will do a certain act, — namely, render yourself liable for that debt, — I will indemnify you." I think it perfectly clear that the only contract which I have to consider is, that between father and son. It is not that he will pay the debt of Wildes, but that if the son will guarantee Wildes' debt, he will see him harmless, or, in other words, indemnify him. If one man could induce

the undertaking would be considered as within the Statute of Frauds if it were to answer for the debt or default of another, notwithstanding it might also be an indemnity. This view of the subject creates, I think, a broad distinction between the present case and Green *v.* Cresswell, which we are not called upon either to overrule or to say that we entirely support."

[1] The statement of the case is taken from 23 W. R. 435. The arguments of counsel are omitted. — ED.

Willis v Sludlow

One Sludlow was asked by son-in-law to lend his name on which to raise money. He did not like his name to go there so often as he induced his son to sign the note as co maker with son in law promising to indemnify son from any loss that might arise from having to pay. Son did so, & had to pay. Pleaded this claim in the administration of father's estate, & legatee objected. Court allowed claim.

Held that promise was not within the statute of frauds. It was not a promise to pay S-in-L's debt, but a promise to indemnify of son guaranteed son-in-law's debt. Claim allowed.

another to alter his line of conduct in that way, and then meet him with the Statute of Frauds, that statute, instead of being a protection against fraud, would be the direct means of fraud. The statute enacts that if one man promises to pay the debt of another the promise is void unless it is in writing, and no one doubts that to be the law; but it appears to me, upon principle, so plain that the present case is not within the statute, that I am very glad to find that what occurred to me as being the proper view of the case is finally decided to be the law on the subject. There has been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided by two of the most eminent judges known on the bench (Mr. Justice Bayley and Mr. Justice Parke, afterwards Lord Wensleydale) in the case of Thomas *v.* Cook, and they decided it upon the plainest principles of common sense and justice. I was therefore surprised to find that in a later case of Green *v.* Cresswell the same Court, constituted at that time of other judges, had taken a different view, and a view which, if it had been maintained, I possibly should not have felt myself obliged to follow. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of Reader *v.* Kingham,[1] when the full number of judges was present, the case of Green *v.* Cresswell was overruled, and the law as laid down by Thomas *v.* Cook restored. The learned judges commented upon those cases, and said that the law was accurately laid down in Thomas *v.* Cook; and I entirely agree in that expression of opinion. I accordingly decide that where one person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement within the Statute of Frauds, and does not require to be in writing. This is a case in which a father induced his son to guarantee the debt of his son-in-law upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him; and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come into his hands. The force of the decision in Reader *v.* Kingham [1] was somewhat shaken by the opinion expressed by Mr. Justice Blackburn in Mountstephen *v.* Lakeman [2]; but, as the decision of the Queen's Bench in that case was reversed in the Exchequer Chamber,[3] and also in the House of Lords,[4] the law rests on the plain and reasonable ground upon which it was put in Reader *v.* Kingham.[1] The decision is, therefore, entirely in favor of the defendant; and I hold that the Chief Clerk has done perfectly right in allowing this £1,000 with interest. Therefore the motion to vary the certificate in that respect must be dismissed with costs.[5]

[1] 13 C. B. N. S. 344. [2] Law Rep. 5 Q. B. 613.
[3] Law Rep. 7 Q. B. 196. [4] Law Rep. 7 H. L. 17.
[5] Batson *v.* King, 4 H. & N. 739 (*semble*); *In re* Bolton, 8 Times L. R. 668; W. N. [1892] 163; 36 Sol. J. 608, s. c.; Hoyle *v.* Hoyle, '93, 1 Ch. 84 (*semble*); Guild *v.* Conrad, '94, 2 Q. B. 885; Godden *v.* Pierson, 42 Ala. 370 (but see Brown *v.* Adams, 1 Stew. 51); Reed *v.* Holcomb, 31 Conn. 360; Smith *v.* Delaney, 64 Conn. 264 (but see Clem-

1894 2 Q.B. 213.
Guild v Conrad.

HARRISON *v.* SAWTEL.

IN THE SUPREME COURT, NEW YORK, MAY, 1813.

[*Reported in* 10 *Johnson*, 242.]

PER CURIAM.[1] This was not a promise to pay the debt, or answer for the default, of another person. It was an original promise between the parties to it, that one of them would indemnify the other, if he would become special bail for a third person whom the defendant was bound to protect and save harmless in the suit. It was done at the request, and for the benefit, of the defendant, as it saved him from becoming bail himself, or procuring some other person to become bail. The case had nothing to do with the Statute of Frauds, and there was a consideration for the promise, the advantage resulting to the defend-

ent's App. 52 Conn. 464); Jones *v.* Shorter, 1 Ga. 294; Resseter *v.* Waterman, 151 Ill. 169 (but see Brand *v.* Whelan, 18 Ill. Ap. 186); Horn *v.* Bray, 51 Ind. 555; Anderson *v.* Spence, 72 Ind. 315 (overruling Brush *v.* Carpenter, 6 Ind. 78); Keesling *v.* Frazier, 119 Ind. 185; Mills *v.* Brown, 11 Iowa, 314; Patton *v.* Mills, 21 Kas. 163; Dunn *v.* West, 5 B. Mon. 376; Lucas *v.* Chamberlain, 8 B. Mon. 276; George *v.* Hoskins (Ky. 1895), 30 S. W. R. 406; Smith *v.* Sayward, 5 Me. 504; Alger *v.* Scoville, 1 Gray, 391; Aldrich *v.* Ames, 9 Gray, 76; Rose *v.* Wollenberg (Oreg. 1896), 44 Pac. R. 382; Boyer *v.* Soules (Mich. 1895) 62 N. W. R. 1000 (but see First Bank *v.* Bennett, 33 Mich. 520); Fidelity Co. *v.* Lawlor (Minn. '96), 66 N. W. R. 143; Minick *v.* Huff, 41 Neb. 516; Holmes *v.* Knights, 10 N. H. 175; Demeritt *v.* Bickford, 58 N. H. 523; Apgar *v.* Miller, 24 N. J. 812; Cortelyou *v.* Hoagland, 40 N. J. 1; Chapin *v.* Merrill, 4 Wend. 657; Barry *v.* Ransom, 12 N. Y. 462; Sanders *v.* Gillespie, 59 N. Y. 250; Tighe *v.* Morrison, 116 N. Y. 263 (overruling Kingsley *v.* Balcom, 4 Barb. 131); Jones *v.* Bacon, 145 N. Y. 446; Shook *v.* Vanmater, 22 Wis. 532; Vogel *v.* Melms, 31 Wis. 306, *Accord.*

Winckworth *v.* Mills, 2 Esp. 484 (overruled); May *v.* Williams, 61 Miss. 125; Garner *v.* Hutchins, 46 Mo. 399 (*semble*); Bissig *v.* Britton, 59 Mo. 204; Draughan *v.* Bunting, 9 Ired. 10; Easter *v.* White, 12 Oh. St. 219; Kelsey *v.* Hibbs, 13 Oh. St. 340; Nugent *v.* Wolfe, 111 Pa. 471 (but see Elkin *v.* Timlin, 151 Pa. 491); Simpson *v.* Nance, 1 Speers, 4; Macey *v.* Childress, 2 Tenn. Ch. 438, *Contra.* (But in Ohio and Pennsylvania, if the promisor and promisee in the promise of indemnity are co-sureties for a third person, the Statute of Frauds is held not to apply. Farrell *v.* Maxwell, 28 Oh. St. 383; Mickley *v.* Stocksleger, 10 Pa. Co. C. 345.)

In Adams *v.* Russell, 20 Vt. 205, the Court declined to express an opinion upon this controverted question.

In Guild *v.* Conrad, '94, 2 Q. B. 885, Lindley, L. J., said (p. 892): "The nature of the promise is all-important; because if it was a promise to pay if the Demerara firm did not pay, then it is void under the Statute of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds." Lopes, L. J., said (p. 895): "A promise to be liable for a debt conditionally on the principal debtor making default is a guaranty, and is a promise to make good the default of another within the statute. On the other hand, a promise to become liable for a debt whenever the person to whom the promise is made should become liable, is not a promise within the Statute of Frauds, and need not be in writing." Davey, L. J., said (p. 896): "In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or who is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not." — ED.

[1] Only the opinion of the Court is given. — ED.

ant from the plaintiff's becoming bail. The defendant being answerable for the party sued, the becoming bail for the party, at the request of the defendant, was as beneficial as if the plaintiff had become bail for the defendant himself. The damages were proved by the expenses the plaintiff had been put to, in endeavoring to surrender Foot, and the defendant had acknowledged the plaintiff's demand, and paid a part of it. The recovery, therefore, was just, and the judgment must be affirmed.

Judgment affirmed.[1]

ANSTEY v. MARDEN.

IN THE COMMON PLEAS, NOVEMBER 26, 1804.

[*Reported in* 1 *Bosanquet & Puller, New Reports*, 124.]

SIR JAMES MANSFIELD, C. J.[2] At the trial of this cause, it was objected, on the part of the plaintiff, that the promise by Weston was a promise within the Statute of Frauds, and therefore no bar to the plaintiff's demand. It appeared to me doubtful how far the promise in this case could be deemed to be within the statute; and it rather struck me that being a promise to pay only 10*s.* in the pound, and not to pay the whole debt, it was an original agreement, and therefore was not within the statute. I did not see how one person could undertake for the debt of another when the debt for which he was supposed to undertake was discharged by the very bargain. No cases, however, were at that time cited. We have now been considering all the circumstances of the case, and the question is, whether justice will not be done by not allowing the plaintiff to take more than what the strictest rule of law will entitle him to? The facts were shortly these: The defendant was upon the brink of a bankruptcy; some of his creditors [the plaintiff included] met to consider what should be done; and his effects being found only sufficient to pay 7*s.* 6*d.* in the pound, the creditors agreed to accept 10*s.* in the pound from Weston in full satisfaction of their debts, and undertook to assign their debts to him. The only object of the deed was the assignment of the debts; and Weston was to pay 10*s.* in the

[1] Garner *v.* Hudgins, 46 Mo. 399; Adams *v.* Russell, 20 Vt. 205 (*semble*), *Accord.*

Similarly, a promise to A to pay B's debt to A is not within the Statute of Frauds, if the promisor, as between himself and B, was already bound to exonerate B. French *v.* French, 84 Iowa, 655; Burr *v.* Wilcox, 13 All. 269 (*semble*); Garner *v.* Hudgins, 46 Mo. 399 (*semble*).

Nor does the Statute of Frauds apply to a promise to A to pay him a debt due to him from the promisor and B jointly. Stephens *v.* Squire, 5 Mod. 205; Orrell *v.* Coppock, 26 L. J. Ch. 269; Lovering *v.* Dixon, 56 Tex. 75 (*semble*). This principle is applied when one promises to pay the debt of a firm composed of the promisor and B. Rice *v.* Barry, 2 Cranch C. C. 447; Files *v.* McLeod, 14 Ala. 611; Weatherby *v.* Hardman, 68 Ga. 592; Hopkins *v.* Carr, 31 Ind. 260. — ED.

[2] The statement of facts, arguments, and the opinion of ROOKE, J., are omitted. — ED.

pound as the price of those debts. After this the plaintiff went out of town, and some of the creditors accepted 10*s.* in the pound, and assigned their debts to Weston. The plaintiff thought proper first to deny his agreement, and then to insist on his right to change his mind and refuse to execute the deed. He had a right to change his mind, but in point of morality and sound honesty his conduct was extremely bad. It was equivalent to obtaining a promise from Marden privately for payment of the whole debt after agreeing with the rest of the creditors to take a part only. He now comes here to set aside the verdict, in order to put into his pocket the other part of the debt for his own benefit, to which Weston is entitled. Supposing the promise by Weston to be a good promise in law, the plaintiff cannot recover the original debt due from the defendant to himself, inasmuch as he has agreed to accept 10*s.* in the pound in satisfaction of that debt, and to assign it to Weston, who is contented with the verdict. The plaintiff has clearly been guilty of very harsh treatment towards the defendant, and I do not think the Court called upon to alter the verdict as a favor to him. He has acted altogether contrary to honor and justice, and I think the verdict ought to stand. I would not have it supposed that I mean to throw any doubt upon the decisions which have been cited respecting the Statute of Frauds. The case of Chater *v.* Becket[1] certainly decides that a mere promise, such as that before us, would be within the statute; and indeed, upon general principles, no one can wish to restrain the operation of the Statute of Frauds. The benefits of that statute are much more apparent to those who are conversant with the practice of the Court of Chancery than those who have only seen the practice of the courts of common law. But upon the whole it appears to me that the agreement by Weston amounted to a purchase of the plaintiff's debt, and that this application for a new trial ought not to be granted.

Rule discharged.

MALLET *v.* BATEMAN.

IN THE EXCHEQUER CHAMBER, NOVEMBER 29, 1865.

[*Reported in Law Reports*, 1 *Common Pleas*, 163.]

THE first count stated, that, in consideration that the plaintiff would sell and deliver to certain persons trading under the firm of G. J. Calvert & Co., certain goods, to wit, buckle plates, which they had ordered and contracted to buy of the plaintiff, without the plaintiff requiring payment in cash for the prices of the same on the delivery thereof, and would take from them their acceptance to a bill of exchange drawn by the plaintiff upon and directed to them, for the payment of the prices of the said goods to the plaintiff's order one month after the date thereof, and would indorse and deliver the same to the defendant,

[1] 7 T. R. 201.

Anstey v Morden

Δ was about to go bankpt. when creditors met. They agreed to accept 10s from one Weston, & to assign debts to him. Then Anstey did not assign, but tried to extort full payment, & got promise by Δ to pay full amt if he would accept & Trustees to enforce this promise.

Ct gave judgment for Δ. Agreement amounted to a purchase by Weston of Π's claim, & he can no longer enforce it.

Mallet v Bateman

Π was about to sell good goods to Δ one Calvert & Co, & agreed that they would take Δ's acceptances if Δ would promise to discount the bills, & indemnify Π from the payment thereof. bills were accepted, but Δ would not discount them & asst. Lower ct held that judgment should be for Δ, as within statute of Frauds.

Ex Chamb. affirmed lower ct, & gave judgment for Δ, a promise to guarantee has to be in writing as much as a guarantee. This was such a promise, so Π's were not to be liable on bills.

and would permit the defendant to deduct from the amount of the said bill a certain sum, to wit, at the rate of £3 per cent. on the amount of the money payable by the said bill for his cashing or discounting the same and indemnifying and protecting the plaintiff as thereinafter mentioned, the defendant promised the plaintiff to cash or discount the said bill for the plaintiff, and indemnify and protect him from the payment thereof: that the plaintiff thereupon sold and delivered to the said G. J. Calvert & Co. the said goods without requiring payment in cash on delivery, and took from them their acceptance to a bill of exchange drawn by the plaintiff upon and directed to the said G. J. Calvert & Co. for the payment of £603 14*s.* 10*d.*, the prices of the said goods, to the plaintiff's order, one month after the date thereof; and that, although the plaintiff was ready and willing to allow the defendant to make the said reduction, &c., and all things had happened, &c., to entitle the plaintiff to a performance by the defendant of his said promise, and to have the said bill cashed or discounted by him, &c., yet the defendant refused to cash or discount the said bill, or to indemnify the plaintiff, &c.

At the trial, it was, amongst other things, objected on the part of the defendant that he was not liable on the first count, as the contract ought to have been in writing, under the Statute of Frauds, 29 Car. 2, c. 3, s. 4. ERLE, C. J., reserved leave to the defendant to move to enter a verdict for him on the first count, if the Court should be of opinion that the contract was one which the statute required to be in writing, — the Court, if necessary, to have power to amend on any terms they might think fit. A verdict was thereupon taken for the plaintiff on the first count for £586 3*s.* 2*d.*, and for the defendant on the money counts.

A rule was accordingly obtained to enter a verdict for the defendant on the first count, and afterwards made absolute: see 16 C. B. N. S. 530; 33 L. J. (C. P.) 243.

The plaintiff appealed; and the question for the opinion of the Court of Appeal was, whether or not the contract upon which the action was brought was required to be in writing, under the Statute of Frauds. If the Court should be of opinion in the negative, the verdict was to be entered for the plaintiff on the first count of the declaration, for £586 3*s.* 2*d.* If the Court should be of opinion in the affirmative, the verdict was to be entered for the defendant on that count.[1]

The case was argued in the Exchequer Chamber before POLLOCK, C. B., CHANNELL, B., BLACKBURN and MELLER, JJ., PIGOTT, B. and SHEE, J.

Coleridge, Q. C. (*Prentice* with him), for the plaintiff. The Court below were wrong in holding that this was a contract which, by the 4th section of the Statute of Frauds, was required to be in writing. It was not a contract or promise to answer for any debt or default of Calvert & Co., but a mere purchase by Bateman from Mallet of Cal-

[1] The statement of the case has been materially abridged. — ED.

vert & Co.'s acceptance. At the time the defendant refused to discount the bill, there was no existing debt due from Calvert & Co. The terms of dealing between them and the defendant had been settled by the correspondence. Instead of cash, the payments were to be made by bill, which bill suspended the liability of Calvert & Co. until it arrived at maturity. A refusal on the part of Calvert & Co. to give a bill would not have entitled Mallet to sue them for the price of the goods, but would only have rendered Calvert & Co. liable to a special action for not accepting the bill.

[BLACKBURN, J. Is it essential that there should at the time have been an existing debt of Calvert & Co., capable of being immediately enforced? If A holds an acceptance of B, not yet due, and C promises to pay it at maturity if the acceptor does not, surely that is within the statute.]

The liability of the defendant arose, according to the understanding of the parties, before any liability arose on the part of Calvert & Co. The substance of the transaction was this: Bateman says to Mallet, "If you will furnish the plates to Calvert & Co., without insisting upon immediate payment, and will take their bill at one month, I will discount it at £3 per cent."

[BLACKBURN, J. Without recourse against any party.]

That, it is submitted, is no promise to answer for the debt or default of Calvert & Co. The defendant had a great interest in the performance of the work by Calvert & Co., and the plaintiff parted with his lien on the goods, as well as with his claim on his vendees.

[BLACKBURN, J. Is not a promise to give a guaranty as much required to be in writing as a guaranty itself?

POLLOCK, C. B. This is nothing more than a promise to indemnify the holder against the default of the acceptor. I think it is clearly within the statute.]

So to hold will be pushing the Statute of Frauds much further than it has ever yet been carried.

[POLLOCK, C. B. Honestly applying it, rather, and not allowing a subtle device to prevail to take a case out of the statute. Every contract which deviates in any degree from the common ought to be in writing.]

It has been frequently held that a contract for the equitable assignment of a debt need not be in writing.

[POLLOCK, C. B. Would a parol promise to buy a bond be binding?]

It is submitted that it would, but it is enough to say that that is not this case.

[BLACKBURN, J. The only question is whether a bargain such as that stated in the 11th paragraph of the special case would, if made by word of mouth, be binding.]

Is it a contract or promise to answer for the debt or default of another person? The bill is spoken of as a thing "bought" by Bate-

man. He undertakes to stand in the vendor's position. In Story on Contracts, 4th edit., p. 398, § 861, it is said: "The statute only applies to collateral engagements, that is, to engagements upon which the guarantor is only conditionally liable, upon the default of some other person who is solely liable originally." Upon this contract it is plain that Calvert & Co. could not remain liable to Mallet. It was an original contract by Bateman, in consideration of certain advantages which would accrue to him from the performance of Mallet's contract with Calvert & Co.

Sir G. Honyman (*Watkin Williams* with him), for the defendant, was not called upon.

POLLOCK, C. B. We are all of opinion that it is unnecessary to hear the counsel for the defendant. My brother Blackburn has, in the course of the argument, stated that which appears to me to dispose of this case, viz., that a contract to give a guaranty is required to be in writing as much as a guaranty itself.[1] If we were to hold that a contract of guaranty must be in writing, but that a contract to give a guaranty need not, we should, I think, be committing the same mistake as our predecessors did with reference to the Statute of Uses. The object of that statute was, that the possession should go along with the use; but a construction was early adopted whereby the possession should go to A in trust for B, and so the effect of the statute was simply to add a few words to the conveyance. Whether the decisions of the courts of equity as to uses and trusts were beneficial or not, I do not stop to inquire; but undoubtedly the whole doctrine arose out of a desire to frustrate the intention of the Statute of Uses. I trust we shall not commit a similar mistake in construing the statute now under consideration. The real question here is, whether the contract declared upon is not substantially a contract that, if Calvert & Co., the buyers of the goods, do not pay for them at the expiration of the month's credit, the defendant will indemnify the plaintiff against their default. In consideration of a discount of 3 per cent., the defendant undertakes to hold the bill without recourse to the plaintiff. That is, in substance, an engagement by which the buyers of the goods are not to be exonerated, but the defendant is to indemnify the seller against their default. That is clearly a contract within the Statute of Frauds. Upon this short ground, we are all of opinion that the judgment of the Court below should be affirmed. *Judgment affirmed.*[2]

[1] In accordance with this principle the Statute of Frauds applies to a promise to become a party to a bill or note as security for a third person, either as an indorser, Smith *v.* Easton, 54 Md. 138; Willis *v.* Shinn, 42 N. J. 138; Carville *v.* Crane, 5 Hill, 483; Bronson *v.* Stroud, 2 McMull. 372; Taylor *v.* Drake, 4 Strob. 431; or as maker, Dee *v.* Downs, 57 Iowa, 589; Wilson *v.* Roberts, 5 Bosw. 100; or as acceptor, Chapline *v.* Atkinson, 45 Ark. 67; Williams *v.* Caldwell, 4 S. Ca. N. s. 100. The rule is the same as to a promise to sign a bond as surety for a third person. Hayes *v.* Burkam, 51 Ind. 130. — ED.

[2] Dougherty *v.* Bash, 167 Pa. 429, *Accord.* — ED.

HARGREAVES v. PARSONS.

IN THE EXCHEQUER, MICHAELMAS TERM, 1844.

[*Reported in* 13 *Meeson & Welsby*, 561.]

THE judgment of the Court was, on the 10th of December, delivered by

PARKE, B.[1] This was an action by the plaintiff against the defendant upon two contracts made by him with the plaintiff, on the assignment of two other contracts between the defendant and Parker, for taking from or delivering to the defendant, at his option, certain shares in a foreign railway, at a fixed premium, on or before the 18th February, 1844; and the defendant agreed to guarantee the delivery by Parker to the plaintiff.

Three objections were made by *Mr. Watson*, at the close of the plaintiff's case, and reserved by the learned judge. The first and most important was, that a note in writing was necessary under the Statute of Frauds, because the agreement or guaranty by the defendant, for the performance by Parker of the new agreement, was a promise to answer for the debt or default of Parker. The learned judge intimated his opinion, that this was not a case within the statute, but was an original promise.

And we are of the same opinion. The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee. This was decided, and no doubt rightly, by the Court of Queen's Bench, in Eastwood *v.* Kenyon, and in Thomas *v.* Cook. In this case Parker had not contracted with the plaintiff, nor was it intended that he should; there was no privity between them; the non-performance of Parker's contract with the defendant would be no default towards the plaintiff, and, consequently, the undertaking by the defendant was no promise to answer for the default or miscarriage of Parker in any debt or duty towards the plaintiff. It was an original promise that a certain thing should be done by a third person.

There must, therefore, be no rule. *Rule refused.*

[1] Only the opinion of the Court is given, and that, too, slightly abridged. — ED.

Here we have an absolute promise that something will happen whether B defaults or not.

Hargreaves v Parsons

Apparently D had a contract with one Parker to take from a debtor to him certain shares of stock on a certain date. Then D made contract with Pl to the same effect, D undertaking to guarantee the delivery by Parker to Pl of shares were not delivered to Pl. Court held that case was not within statute, & gave judgment for Pl.

Ct affirmed this. Promise here was D's only. Parker was under no obligation to Pl in the first. Pl D could not have been answering for another's obligation which did not exist.

Cardiff v Moffat

P sold horse to D, & took as part payment a note of one Cornell, whom D orally represented to be "good" & that the note would be paid at maturity. Note not paid & P sues. D objected statute of Frauds.

Held for judgment for P. Altho in form it is a promise to answer for debt of another, in reality it is a promise to pay D's own debt at maturity. D is promising to buy certain chattels, unless C does anticipate him.

CARDELL v. McNIEL.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1860.

[*Reported in* 21 *New York Reports*, 336.]

COMSTOCK, Ch. J.[1] The contract for the sale of the plaintiff's horse to the defendant, was concluded on the part of the latter by his agent, Acker.

By the terms of the contract, as testified to by the plaintiff's witness, Greenfield, and as found by the referee, the horse was to be paid for in a span of horses owned by the defendant, which were to be delivered to the plaintiff; by a note of $110, to be signed by the defendant and one Ingham; by a note of $40, given by one Burk; and by a note of $125, given by one Cornell, payable in a buggy, on the 29th of June, 1854. The defendant, through his agent, warranted Cornell to be "good," and that the plaintiff would get the buggy when the note became due. On these terms the sale was completed, and the plaintiff delivered his horse. The notes were to be sent to the plaintiff on the following day, and they were sent accordingly. There was no written guaranty of the note of Cornell, which turned out to be worthless. The action is founded on the verbal undertaking.

We think that the guaranty was, in effect, one of payment, according to the terms of the note, and not for the collection of the demand by process of law. The evidence and the finding are, that the defendant's agent said that the maker was good, and that he would warrant that the plaintiff would get the buggy when the note fell due. The obvious meaning of this is that the obligation would be paid at maturity, and according to its terms. The contract was, therefore, broken, and the defendant became liable to suit upon it, when Cornell failed to pay, after payment was due.

It is claimed that the guaranty is void by the Statute of Frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But, looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him. The question at this time hardly claims a discussion, because it was, in effect, decided by this Court upon the fullest consideration, in Brown v. Curtiss. There the holder of a note transferred it in payment of his own debt, indorsing upon it a guaranty of the payment which expressed no consideration; and on that ground the undertaking was claimed to be void. It was conceded to be

[1] Everything is omitted except the opinion of the Court relating to the Statute of Frauds. — ED.

void, provided the statute applied to such a case. It was, however, held to be a valid promise, on the ground that the statute did not apply. "In such cases," it was observed, "where the party undertakes, for his own benefit, upon a full consideration received by himself, the promise is not within the statute." It is impossible to distinguish, in principle, between that case and the present: certainly no distinction can be drawn favorable to the defendant. Johnson *v.* Gilbert;[1] Nelson *v.* Boynton.[2]

All the judges concurring, *Judgment affirmed.*[3]

BROWN, PLAINTIFF IN ERROR, *v.* CURTISS, DEFENDANT IN ERROR.

IN THE COURT OF APPEALS, NEW YORK, MAY, 1849.

[*Reported in* 2 *New York Reports*, 225.]

ON error from the Supreme Court, where the action was *assumpsit* upon a guaranty, brought by Curtiss against Chester Brown, tried at the Columbia Circuit, before EDMONDS, Circuit Judge, in September, 1845. On the trial the plaintiff gave in evidence a promissory note as follows: —

"For value received I promise to pay Chester Brown or bearer fifty dollars, six months from date, with use.

"G. F. BROWN.

"CANAAN, April 2, 1838."

The plaintiff also proved that the defendant transferred the note to him in exchange for another note which he held against the defendant for borrowed money. When the transfer was made, the plaintiff said to the defendant: "I know nothing of the maker's circumstances, but if you will guarantee the note I will take it." The defendant thereupon executed the following guaranty on the back of the note: "I guaranty the payment of the within. Chester Brown." The evidence as to the consideration of the transfer and guaranty was objected to by the defendant, and the objection overruled. The defendant excepted. It

[1] 4 Hill, 178. [2] 3 Metc. 400.

[3] Beaty *v.* Grim, 18 Ind. 131 (but see Hassinger *v.* Newman, 83 Ind. 124); Little *v.* Edwards, 69 Md. 499; Wilson *v.* Hentges, 29 Minn. 102; Johnson *v.* Gilbert, 4 Hill, 178; Newell *v.* Chapman, 74 Hun, 111; Malone *v.* Keener, 44 Pa. 107; Hopkins *v.* Richardson, 9 Grat. 485, *Accord.*

See to the same effect the following cases in which negotiable notes payable to the order of A were assigned by A without indorsement, but with a guaranty of payment: Mobile Co. *v.* Jones, 57 Ga. 198; Smith *v.* Finch, 3 Ill. 321; Adcock *v.* Fleming, 2 Dev. & B. 225; Ashford *v.* Robinson, 8 Ired. 114; Rowland *v.* Rorke, 4 Jones (N. C.), 337; Hall *v.* Rodgers, 7 Hum. 536; Wyman *v.* Goodrich, 26 Wis. 21. — ED.

Brown v Curtiss

Π owned note of Δ's ∴ at maturity Δ gave Π a note of a 3rd person ∴ Δ wrote on back "I guarantee the payment of the within". No consideration was expressed ∴ note not paid at maturity ∴ now sues without making demand ∴ Lower Ct held that note did not come within Statute of Frauds ∴ hence no consideration need be expressed

Ct of Appeals affirmed this - guaranty promise is in writing ∴ consideration is something entirely diff. ∴ moves from Π to Δ. In such cases promise is not within the statute ∴

was admitted that there had been no demand of the maker, nor any notice of non-payment. The defendant offered to prove that from the time the note fell due until the latter part of the year 1843 the maker was able to pay the note; that he then failed, and was insolvent at the commencement of the suit, and still remained so. This evidence was objected to by the plaintiff and excluded. The defendant excepted.[1]

The evidence being closed, it was insisted on the part of the defendant that the plaintiff could not recover, on the grounds: 1. That there was no proof of demand and notice; 2. That the guaranty was void by the Statute of Frauds, there being no consideration expressed therein. The circuit judge directed the jury to find for the plaintiff, and the defendant excepted. The Supreme Court sitting in the Third District refused a new trial, and, after judgment for the plaintiff, the defendant brought error to this court.

K. Miller, for plaintiff in error.

C. L. Monell, for defendant in error.

BRONSON, J. The only remaining question is on the Statute of Frauds. 2 R. S. 135, § 2. If the case is within the statute, it is impossible to get over the objection that no consideration is expressed in the guaranty. I know it was held in Manrow *v.* Durham[2] that a guaranty like this was a promissory note, which imports a consideration, and was therefore valid. But that case, which has been questioned elsewhere (Story, Prom. Notes, 597) as well as at home, cannot be law. An undertaking that another man will perform his contract is not a promissory note. It is not within any definition which was ever given of a promissory note, and it cannot be held to be such without confounding all legal distinctions in relation to the nature of contracts.

But I think the Statute of Frauds does not apply to this case. Although in form this is a promise to answer for the debt or default of another, in substance it is an engagement to pay the guarantor's own debt in a particular way. He does not undertake as a mere surety for the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker. The defendant was a debtor to the plaintiff, and gave the note, with the guaranty, to satisfy that debt. This belongs to the third class of cases mentioned by Kent, C. J., in Leonard *v.* Vredenburgh.[3] There was a new and distinct consideration, independent of the debt of the maker, and one moving between the parties to the new promise. In such cases, where the party undertakes for his own benefit, and upon a full consideration received by himself, the promise is not within the statute. It would be good without any writing. The point was decided by the Supreme Court in Johnson *v.* Gilbert,[4] and I do not think it necessary to refer to other cases holding the same doctrine.

[1] The opinion of the Court overruling this exception is omitted, together with the concurring opinion of STRONG, J., in regard to the Statute of Frauds. — ED.

[2] 3 Hill, 584. [3] 8 John. 38, 39. [4] 4 Hill, 178.

JEWETT, C. J., and GARDINER, J., were of opinion that the guaranty was within the Statute of Frauds, and therefore void.

Judgment affirmed.[1]

DOWS AND ANOTHER *v.* SWETT.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 10, 1883.

[*Reported in* 134 *Massachusetts Reports*, 140.]

C. ALLEN, J. This case, unfortunately, must be sent back for another trial, and it becomes desirable to state more fully the principles on which its determination must depend. The declaration alleges, in substance, that the defendant was indebted to the plaintiffs in the sum of $200 for the balance due on a due-bill given to them for goods sold and delivered by them to him, and that he asked them to take in exchange for the sum due on said due-bill a promissory note for the same sum which he had caused to be made, and which was signed by one Robinson, and made payable to the order of the plaintiffs; and, to induce the plaintiffs to make said exchange, the defendant agreed that, if said note should not be paid by Robinson at its maturity, he, the defendant, would pay it himself; that upon this verbal guaranty the plaintiffs received the note, and gave therefor the due-bill; that the note was not paid by Robinson, and that the defendant refuses to fulfil his said agreement. There was evidence at the trial tending to show that in 1874 the plaintiffs brought an action against the defendant upon their account for goods sold and delivered, and that at the trial of said action in 1874 it appeared that the bill for the goods was settled by check and by the said due-bill, and that the due-bill also was paid by cash, merchandise, and said Robinson's note; whereupon a verdict was taken for the defendant, upon which judgment was rendered.

The difficulty in the case seems largely to depend upon the unusual state of facts; there having been an action brought by the plaintiffs against the defendant upon his original indebtedness to them, in which action a judgment was rendered for the defendant.

[1] Mobile Co. *v.* Jones, 57 Ga. 198; Darst *v.* Bates, 95 Ill. 493; Jones *v.* Palmer, 1 Doug. (Mich.) 379; Thomas *v.* Dodge, 8 Mich. 51; Sheldon *v.* Butler, 24 Minn. 513; Crane *v.* Wheeler, 48 Minn. 207; Barker *v.* Scudder, 56 Mo. 272; Bruce *v.* Burr, 67 N. Y. 237; Milks *v.* Rich, 80 N. Y. 269; Fowler *v.* Clearwater, 35 Barb. 143; Daubner *v.* Blackney, 38 Barb. 432; Lossee *v.* Williams, 6 Lans. 228; Allen *v.* Eighmie, 14 Hun, 559; Hall *v.* Rogers, 7 Hun. 536; Wyman *v.* Goodrich, 26 Wis. 21; Eagle Co. *v.* Shattuck, 53 Wis. 455, *Accord*.

Wood *v.* Wheelock, 25 Barb. 625, *Contra*. In Milks *v.* Rich, *supra*, EARL, J., said (p. 271): "The reasoning to take this promise out of the statute is quite subtle, and I should have much difficulty in yielding it my assent but for the authorities which I think ought now to control." See also Hassinger *v.* Newman, 83 Ind. 124. — ED.

Howe v Swett

Π sold goods to Δ & Δ gave Π's a due bill on payment. Then Δ's asked Π to take in exchange for the due bill a promissory note of one Robinson which was done, promising that if Robinson did not pay at maturity Δ would. Note not paid & suit on promise. Π had previously sued Δ on count for goods sold, & had failed, payt having been made by Ch & Π's note. Judgment here for Π below.

Ct gave judgment for Δ & ordered new trial. Under the declaration & evidence it must be taken that the note was taken in absolute payment, & then Δ was really answering for obligation of another & is within the statute

dictum, that if it had only been taken in conditional payment, it would be a promise to answer for his own debt, & not within the statute;

Where a note of a third party is taken by a creditor from his debtor, for or on account of a pre-existing debt, or on a consideration then first accruing, it may be received either in absolute payment, conditional payment, or as collateral security. And in every case it may be shown by evidence what was the actual transaction, and on what terms the note was received. Butts v. Dean;[1] Parham Sewing Machine Co. v. Brock.[2] Where such note is taken in absolute payment of a pre-existing debt, or of a liability for money lent, service rendered, or other consideration accruing at the time of taking it, the effect, of course, is to extinguish the liability of the person who transfers the note, and to substitute therefor the liability of the parties to the note, as the sole subsisting obligation. But where the note is taken as collateral security, or in conditional payment, the right of action against him who makes the transfer is not defeated altogether, but is, at most, only suspended during the time the note has to run, and revives again upon the non-payment of the note at its maturity. The original indebtedness in such case is not discharged, unless the note is paid. The Kimball;[3] Byles on Bills, 6th Am. ed. 236, 380, 385; 2 Am. Lead. Cas. 4th ed., 250, 251, and cases cited; Belshaw v. Bush;[4] Valpy v. Oakeley;[5] Miles v. Gorton.[6]

In the latter class of cases, the transaction is as if the debtor said: "I owe you a debt. Take this note and collect it if you can. If you get the money on it, that will pay you. If you do not, I will myself pay you what I owe." In all such cases the defendant's promise is in effect to pay his own debt, and it is not necessary that such promise should be in writing, though incidentally the debt of a third person is guaranteed. And many of the decisions of courts, which at first sight may appear to hold that an oral guaranty of the note of another, which is transferred on account of a debt due from the guarantor, is not within the Statute of Frauds, will on a careful examination be found not to rest on the principle above stated, and not to be necessarily inconsistent with our own conclusion in the present case. For example, in Milks v. Rich,[7] Earl, J., after stating that "the reasoning to take this promise out of the statute is quite subtle, and I should have much difficulty in yielding it my assent, but for the authorities which I think ought now to control," goes on to say: "The defendant's promise may be regarded, in effect, not as a collateral promise to answer for the default of Marsh, but as a promise to pay the plaintiff for the money he had had, in case Marsh did not pay him, like the promise of one to pay his own debt, in case a third person did not pay it." In Bruce v. Burr,[8] the decision rests on the same distinction; and both cases refer, for authority, to Cardell v. McNiel, where Comstock, C. J., in delivering the opinion of the Court, said: "In

[1] 2 Met. 76.
[2] 113 Mass. 194.
[3] 3 Wall. 37.
[4] 11 C. B. 191, 204.
[5] 16 Q. B. 941.
[6] 2 Cr. & M. 504, 512.
[7] 80 N. Y. 269, 271.
[8] 67 N. Y. 237.

mere form it was certainly a collateral undertaking. . . . But, looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him." In all these cases it will be observed that the Court carefully put the decision on the express ground that the original debtor is not discharged, and his debt is not extinguished, until the note is actually paid. So in Pennsylvania, in Taylor *v.* Preston,[1] Mr. Justice Woodward, a high authority, says, the statute does not require the promise to be in writing "where it is in effect to pay the promisor's own debt, though that of a third person be incidentally guaranteed; it applies to the mere promise to become responsible, but not to actual obligations" — i. e. of the promisor. "Buying the land, the promise to pay for it, whatever the form, was a promise to pay their own debt." It "was not only a stipulation to pay a debt which Preston owed, but a stipulation to pay the price of property they had bought." To the same effect are Townsend *v.* Long,[2] and Malone *v.* Keener.[3]

The above suggestions will not reconcile all the cases, but in our opinion they are sufficient to show the just grounds on which the application of the clause of the Statute of Frauds now under consideration depends. When the present case was first before this court,[4] the decision was put expressly on the ground that the defendant's previous liability had been settled and discharged, so that the only existing direct liability was that of Robinson upon his note; and under this state of things the defendant's oral promise to pay the note, if Robinson did not, could not be treated as a promise to pay a subsisting debt of the defendant, but only as a collateral promise to pay Robinson's debt, and as such was within the Statute of Frauds. Upon further consideration, we adhere to that decision as a correct exposition of the law. When the case came a second time before this court,[5] the point determined was that the plaintiffs were not precluded by what had happened before from relying on the second and third counts; and for this reason a new trial was properly granted. An additional statement in the opinion may have led to the inference that, in the view of the Court, if the leading and chief object of the defendant's promise was in effect to pay his own debt, it should be considered in substance that the defendant guaranteed his own debt, and that therefore his promise to pay Robinson's note, if Robinson should not, was not within the Statute of Frauds; and the learned judge of the Superior Court, upon the new trial, so ruled. But we think this ruling cannot be supported, as applicable to the case, as it comes before us. If Robinson's note was not taken in absolute payment, and if the due-bill was still an existing liability, then the defendant's promise might perhaps be found, as matter of

[1] 79 Penn. St. 436, 441. [2] 77 Penn. St. 143.
[3] 44 Penn. St. 107. [4] 120 Mass. 322. [5] 127 Mass. 364.

fact, to have been intended and accepted as a promise to pay the due-bill. But if the note was taken in absolute payment, then the liability of the defendant was of course extinguished, and it follows that the only remaining direct liability was that of Robinson on his note, and the promise of the defendant could be treated only as collateral. The declaration is on a promise to guarantee Robinson's note, and it is not a case for saying that the declaration is inartificial, and that in substance and effect it sets out a promise by the defendant to pay his own debt; because, in the first place, the declaration appears to have been very carefully drawn, and, in the second place, the evidence tended to show that the plaintiffs in their former action sought to recover on their own debt, and failed.

It does not distinctly appear whether there was then a count upon the due-bill, as representing a cause of action distinct from that for goods sold and delivered. But in the present action the third count was upon the due-bill, and it has been stricken out, upon the order of the judge that the plaintiffs should elect upon which count they would proceed to trial. The due-bill is out of the case. Only the first count remains. The question, therefore, is now distinctly presented, whether the defendant can be held liable on an oral promise to guarantee the note of a third person, transferred by him to his creditor, when that promise cannot by any construction be enforced as in reality a recognition of, or a promise to pay, his own pre-existing debt. To hold him liable under such circumstances, would be to hold him to a greater liability than if he had put his name upon the back of the note, and would be inconsistent with the Gen. Sts. c. 105, § 1.

Exceptions sustained.[1]

J. B. Richardson, for the defendant.

D. B. Gove, for the plaintiffs.

WOLFF AND HENRICKS *v.* KOPPEL.

IN THE SUPREME COURT, NEW YORK, JULY, 1843.

[*Reported in* 5 *Hill*, 458.]

ERROR to the New York C. P., where Koppel sued Wolff & Henricks to recover the price of certain goods alleged to have been sold by the latter as factors acting under a *del credere* commission. The agreement *del credere* was by parol; and one point made in the court below was, that the defendant's engagement, not being in writing, was void by the Statute of Frauds. The Court held otherwise; and, after judgment in favor of the plaintiff, the defendants sued out a writ of error.

J. T. Brady, for the plaintiffs in error.

E. C. Benedict, for the defendant in error.

[1] Sheldon *v.* Butler, 24 Minn. 513; Crane *v.* Wheeler, 48 Minn. 207; Eagle Co. *v.* Shattuck, 53 Wis. 455. *Contra.* — ED.

By the Court, COWEN, J. It is objected that the contract of a factor, binding him in the terms implied by a *del credere* commission, is within the Statute of Frauds, and should therefore be in writing. Such is the opinion expressed by Theobald (Pr. and Surety, 64, 65), and in Chit. On Contr. 209, 210, Am. ed. of 1842. The question was also mooted in Gall *v.* Comber,[1] but not decided, as seems to be implied in the careless manner in which the case is quoted by Chitty. All the authority presented on the argument grows out of the nature of the contract as held by the K. B. in Morris *v.* Cleasby.[2] That case certainly defines the liability of the factor somewhat differently from what several previous cases seem to have done. The effect of acting under the commission is said to be, that the factor becomes a guarantor of the debts which are created; that is to say, they are debts due to the merchant, and the factor's engagement is secondary and collateral, depending on the fault of the debtors, who must first be sought out and called upon by the merchant. See also Hornby *v.* Lacy,[3] Peele *v.* Northcote,[4] Leverick *v.* Meigs.[5] On this we have the opinion of learned writers that if the agreement *del credere* be made without writing, the case comes within the statute. On the other hand, approved writers assert that this is not so. 1 Beawes, 46, 6th Lond. ed.; 3 Chit. Commercial Law, 220, 221. It is true, these latter go on the more stringent obligation supposed by Lord Mansfield, — that of a principal debtor on the part of the factor, the accessorial obligation lying rather on the purchaser. This view of the matter was no longer correct after the cases I have mentioned were decided. The consequence sought to be derived, however, by writers, is merely speculative; and the contrary has of late been directly held by the Supreme Court of Massachusetts, in Swan *v.* Nesmith.[6] It is said this was without the Court being aware of Morris *v.* Cleasby. Be that as it may, they seem to have been fully aware of the rule laid down in that case, and to have recognized it as correct. They considered the obligation as a guaranty. But a guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the *onus* of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same

[1] 1 B. Moor. 279; 8 Taunt. 558, s. c.
[2] 4 Maule & Selw. 566, 574, 575.
[3] 6 Maule & Selw. 166, 171, 172.
[4] 7 Taunt. 478, 484; 1 B. Moor. 178, s. c.
[5] 1 Cowen, 645, 664.
[6] 7 Pick. 220.

Wolff v Koppel

D was a factor (del credere) selling P's goods. Apparently customer was insolvent & P could not collect from him. The del credere commission was by parol & P sues to recover. Lower ct gave judgment for P.

Sup Ct affirmed this & gave judgment for P. del credere factor gets paid for his obligation, which is that he will make no sales to persons not absolutely solvent. The duty to see the money paid to the principal is a duty of [illegible]

in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another, — some future vendee, to whom the merchant is first to resort. Upon non-payment by the vendee, the debt falls absolutely on the factor. As remarked by Parker, C. J., in Swan *v.* Nesmith, the form of the action does not seem to be material in such case; that is to say, whether the merchant sue for goods sold, or on the special engagement. The latter is perhaps the settled form; but still the action is, in effect, to recover the factor's own debt. In the late case of Johnson *v.* Gilbert, the defendant, in consideration of money paid for him by the plaintiff, assigned a chattel note and guaranteed its payment. In such a case the declaration must be on the guaranty to pay the debt of another; but this is so in form merely. We held that the contract was to pay the defendant's own debt; that it was not a contract to pay as the surety of another. All such contracts and many others are, in form, to pay the debt of another, and so literally within the statute, but without its intent. A promise by A to B, that the former will pay a debt due from the latter, is not within the meaning, though it is within the words. Conkey *v.* Hopkins;[1] Eastwood *v.* Kenyon. So are a numerous class of cases, where the promise is made in consideration of the creditor relinquishing some lien, fund, or security. Theobald, Pr. and Surety, 45, and the cases there cited. The merchant gives up his goods to be sold, and pays a premium. Is not this in truth as much and more than many of those cases require which go on the relinquishment of a security? Suppose a factor agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute? The amount of the argument for the defendant would seem to be, that an agent for making sales, or indeed a collecting agent, cannot, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages. *Judgment affirmed.*[2]

[1] 17 John. 113.

[2] Affirmed in 2 Den. 368.

In Couturier *v.* Hastie, 8 Ex. 40, Parke, B., delivering the opinion of the Court, said (p. 55): "The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents; namely, responsibility

SUTTON & CO. v. GREY.

IN THE QUEEN'S BENCH DIVISION, JUNE 28, 1893.

[*Reported in* 69 *Law Times Reports*, 354.[1]]

BOWEN, L. J.[2] This is an action for a contribution to cover the loss incurred by the plaintiffs, as stockbrokers, in certain transactions which the plaintiffs allege were entered into under a contract between themselves and the defendant that he should contribute to the plaintiffs half the loss that they might incur in those transactions. The plaintiffs had embarked upon the transactions in question for a client named Robertson, who had been introduced to them by the defendant. The plaintiffs alleged (though this was disputed by the defendant), that they had employed the defendant to introduce clients, Robertson amongst others, on terms that he should contribute proportionately toward any loss that the plaintiffs might sustain in the operations which they effected for these clients. [His Lordship stated that there had been an acute conflict of evidence, and continued:] I have weighed the matter very carefully, and observed the parties in the box, and I have come to the conclusion that the plaintiffs are correct in saying that it was arranged between them and the defendant that he should contribute to any loss that might occur to them upon Robertson's transactions. That being so, the only question which remains is whether or not this contract is a promise to answer for the debt, default, or miscarriage of another within sec. 4 of the Statute of Frauds, which requires such a contract to be in writing as a condition preliminary to its enforcement in a court of law. The defendant maintains that it is such a contract. But the plaintiffs allege that this agreement is not a promise to answer for the debt or default of another within the meaning of the Statute of Frauds, and they put their case on the same sort of ground as that on which Parke, B., decided in Couturier *v.* Hastie.[3] Since that decision, it must be taken to be the view of the courts that, at all events in the case of a *del credere* agent, who is employed to sell on the

for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given; and the case resembles in this respect those of Williams *v.* Leper, 3 Burr. 1886, and Castling *v.* Aubert, 2 East, 325. We entirely adopt the reasoning of an American judge (Mr. Justice Cowen), in a very able judgment on this very point in Wolff *v.* Koppel, 5 Hill, N. Y. Rep. 458."

See to the same effect, Wickham *v.* Wickham, 2 K. & J. 478 (*semble*): Swan *v.* Nesmith, 7 Pick. 220; Suman *v.* Inman, 6 Mo. Ap. 384; Sherwood *v.* Stone, 14 N. Y. 267; Guggenheim *v.* Rosenfeld, 9 Baxt. (Tenn.) 533; Bradley *v.* Richardson, 23 Vt. 720. — ED.

[1] 1893 Q. B., s. c. — ED.

[2] Everything is omitted except the opinion of the Court upon the Statute of Frauds. — ED.

[3] 8 Ex. 40.

terms of guaranteeing the solvency of the buyer, the promise which he makes is not a promise to answer for the promise of another within the Statute of Frauds. Couturier *v.* Hastie, as is well known, is based on a previous American decision, Wolff *v.* Koppel, which has ever since been referred to as a leading authority, and has been explained in different ways in different cases. That Couturier *v.* Hastie was in some cases a strong decision, having regard to the express words of the statute, may, I think, be taken to be the view of many judges; and I would refer in particular to the case of Wickham *v.* Wickham,[1] from which I think it appears that the case is one which has been supposed to have gone to an extreme in distinguishing between promises which are, and which are not, within the statute. Nevertheless, it seems to me to have been the view of the Court in Couturier *v.* Hastie that sect. 4 of the Statute of Frauds does not strike at promises which are not in the direct object of the giving of the consideration, and that therefore the terms of a *del credere* agency, which included a guaranty for the future debt of the person to whom goods were to be sold, was really to be regarded rather as a contract, the object of which was not to guarantee the debt, but to settle the terms upon which the agent should be employed to sell. It seems to me that although Couturier *v.* Hastie is not exactly in point, it would be perhaps introducing too fine a distinction if I were to endeavor to distinguish between it and the present case. It is certain that the object of the contract in the present case was that the defendant should introduce responsible persons to the plaintiffs, and the contract included a guaranty that he would indemnify the firm against his not doing so. That, I think, is really a contract which regulates the terms of the agency, and the defendant's liability to answer for the debt of another is only an ulterior consequence of the terms in which the contract is framed. I think I am bound to abstain from drawing too fine distinctions between the present case and Couturier *v.* Hastie, and I therefore hold that the defendant is not shielded from liability by the provisions of the Statute of Frauds, because this is not a promise to answer for the debt of another within sect. 4. Of course, if this is a partnership, the second point does not arise. I therefore give judgment for the plaintiff for the amount claimed, £1,143 4*s.* 8*d.* *Judgment for plaintiffs.*[2]

[1] 2 K. & J. 478.

[2] Affirmed in the Court of Appeal, '94, 1 Q. B. 285. — ED.

Sutton v Grey

P employed D to get clients for them in stock broking transaction, agreement being that D would pay P's losses. D's got into transaction without Robertson & now sue to recover losses.

Ct gave judgment for P. Case to be governed by Couturier v Hastie, i.e. the promise sued on, was one which the direct object of the giving of the consideration to D was only to indemnify P against part of the liability he assumed for others and he was to be the gainer.

WILLIAMS *v.* LEPER.

IN THE KING'S BENCH, MAY 2, 1766.

[*Reported in* 3 *Burrow*, 1886.]

ONE Taylor, a tenant to the plaintiff, being three quarters of a year (which amounted to £45) in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors.[1] They employed Leper, the defendant, as a broker, to sell the effects; and, accordingly, he advertised a sale. On the morning advertised for the sale, Williams the landlord came to distrain the goods in the house. Leper, having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent, if he would desist from distraining; and he did thereupon desist.

At the trial, a verdict was found for the plaintiff, for £45.

The question was whether the verdict should be entered up for £45 or for a smaller sum (£7 5*s.*), the promise not having been reduced to writing.

It was now argued by *Mr. Morton* and *Mr. Walker* for the plaintiff; and by *Sir Fletcher Norton* and *Mr. Wallace* for the defendant.

The counsel for the plaintiff spoke to this effect: —

It is objected on the part of the defendant, "That this is an undertaking or special promise for the debt of another person, within the Statute of Frauds; and therefore ought to have been reduced into writing."

Answer: —

But this is not such a special promise for the debt of another, as is within the Statute of Frauds. That statute only meant to prevent parol promises, where there was no new consideration moving from the party making the promise to the party to whom it was made: it was not meant to prevent direct undertakings; but only collateral ones, for the debt, default, or miscarriage of others. Whereas here was a new consideration; for, the goods of Leper were, at the time of the promise, liable to the landlord's distress.

The case of Rothery *v.* Curry[2] in C. B. has been urged by the defendant's counsel, as in point. But that was only putting him off from suing, "in consideration that the plaintiff would not sue A. B." It was held to be within the statute.

Buckmyr *v.* Darnall — "In consideration that the plaintiff would lend two geldings to A. B. and C. D. they should return them" — was held to be collateral and within the statute.

Fish *v.* Hutchinson[3] was for a debt of another: "J. S. being indebted to the plaintiff in £8 4*s.* the defendant promised to pay the costs, if the

[1] By the report of the case in 2 Wils. 308, it appears that Leper was the grantee in the conveyance by Taylor in trust for his creditors. — ED.

[2] Tr. 21 G. 2. [3] 2 Wils. 94.

Williamson Feb 1

One Taylor was tenant to Π, & was insolvent & in arrears in rent. Taylor made an assignment for the benefit of creditors to Δ, who was about to sell them. Π entered to distrain, when Δ promised him, if he would permit sale to go on, the arrears in rent would be paid, & Π consented & Π was sued. Contract was not in writing. & Δ set up Statute of Frauds.

Judgment for Π. Statute was not [illegible]

plaintiff would discontinue the action," which he did. The promise, not being in writing, was holden void, by the whole court.

But those were mere naked promises by persons not obliged to answer for the debt or demand, on their own account. The present case is a direct undertaking, for himself, and not for another. The plaintiff had a legal interest in these goods, prior to the bill of sale, and has been deprived by the defendant of an advantage which he can never have again. The property of these goods was in Leper, as trustee for the creditors, at the time when he made this promise. It is an original undertaking.

The case of Reid *v.* Nash is in point — "In consideration that the plaintiff would withdraw his record, and not try the cause, he promised to pay £50." That was an original undertaking. So, in Stephens *v.* Squire,[1] — It was not a promise for a debt of another person: the defendant was himself originally liable. It was a promise to pay £10 and costs of suit, in consideration "That the plaintiff would not prosecute the action."

This promise "To pay the arrears, if the plaintiff would desist from distraining," is a new express promise, and not within the statute. Therefore it was not necessary that this promise should be in writing. It was not a collateral undertaking, but an original one.

The counsel for the defendant insisted, that upon this declaration, coupled with the facts given in evidence, the plaintiff had no right to recover this £45. For the declaration expressly charges "That Taylor was indebted to the plaintiff in £45 for ¾ of a year's rent; and that the defendant undertook to pay it," which is directly within the words of the Statute of Frauds, "a special promise to answer for the debt of another person."

Leper was in possession of the goods of the tenant, who owed the plaintiff three quarters' rent; and about to sell them. The landlord comes to distrain for this three quarters of a year's rent. Leper promises to pay it, "if he will desist from distraining." He promises absolutely — "to pay it;" not "to pay it out of the goods sold," or under any other restriction.

A forbearance to sue is a good consideration for an *assumpsit*.

Before the Statute of Frauds, all promises were binding, whether original or collateral. But that statute says, that "where one promises for the debt, default, or miscarriage of another the promise must be in writing."

The cases of Fish *v.* Hutchinson[2] and Reid *v.* Nash are both upon the same principle: both were collateral promises. The second promise did not extinguish the original debt; it did not extinguish the action. Therefore both were liable for the same debt. The original debtor remained liable; and therefore the promise was collateral, and consequently within the act. Indeed, if the original debtor is discharged,

[1] 5 Mod. 205. [2] 2 Wils. 94.

then it is an original promise and not collateral, which was the case of Reid *v.* Nash: that was an action of trespass for assault and battery brought by Reid against Johnson; and the defendant promised "That if the plaintiff would withdraw his record, he would pay £50, &c." It was an original tort. Therefore that case was not contrary to Fish *v.* Hutchinson, but determined upon the same principle.

The plaintiff cannot recover upon this declaration: it is upon a promise "to pay the debt to which Taylor was before liable;" and Taylor still remains liable, till actual satisfaction. Therefore this is a collateral promise, and both are liable. Consequently, 't is within the act.

If indeed the declaration had averred "That Leper promised to pay it out of the produce of the goods when sold; and that in consideration of that promise, he had desisted from distraining,"—that had been a different case.

LORD MANSFIELD. The evidence went further than the declaration states. The declaration does not state whether the promise was in writing or not; the evidence shows it was not. But both are consistent.

This case has nothing to do with the Statute of Frauds.

The *res gesta* would entitle the plaintiff to his action against the defendant.

The landlord had a legal pledge. He enters, to distrain; he has the pledge in his custody. The defendant agrees "That the goods shall be sold, and the plaintiff paid in the first place." The goods are the fund; the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the Statute of Frauds. It is rather a fraud in the defendant, to detain the £45 from the plaintiff, who had an original lien upon the goods.

MR. JUSTICE WILMOT thought this case out of the Statute of Frauds. This is not a collateral promise to pay the debt of another.

The case of Reid *v.* Nash does not clash with the other determinations on the Statute of Frauds. That was an original undertaking: the debtor was never liable for that particular sum of £50.

But this case is not within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is in possession of the goods, having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise, in order to discharge the goods of this distress. I consider this distress as being actually made. Leper says, "if you will quit the goods and disencumber the fund, I will pay you."

Leper became the bailiff of the landlord; and when he had sold the goods, the money was the landlord's (as far as £45) in his own bailiff's hands. Therefore an action would have lain against Leper for money had and received to the plaintiff's use.

MR. JUSTICE YATES. It was not necessary to state in the declaration, "That the promise was in writing."

This declaration states a promise "to pay the arrear of rent amounting to £45" (a specific sum). The defendant was in possession of the goods, and about to sell them. The plaintiff entered, with intent to distrain them for £45. The defendant says — "Let me go on to sell them, and I will pay you the £45." He undertook to pay this, in all events, peremptorily and absolutely. This is an original consideration to the defendant.

Therefore he concurred in being of opinion for the plaintiff, and that the verdict should be entered for the sum of £45.

MR. JUSTICE ASTON. If this was a promise to pay the debt of Taylor, I should think it within the statute, upon Sir Fletcher Norton's distinctions, which are the true ones.

But I look upon the goods here to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for £45.

The goods were a fund between both, and on that foot I concur.

But otherwise, I should have thought (with Sir Fletcher) "That the case of Reid *v.* Nash does not clash with the other determinations about collateral promises."

Postea to be delivered to the plaintiff, and the verdict to stand for the whole £45.[1]

[1] Castling *v.* Aubert, 2 East, 325; Edwards *v.* Kelly, 6 M. & Sel. 204; Bampton *v.* Paulin, 4 Bing. 264, 12 Moo. 497, S. C.; Walker *v.* Taylor, 6 C. & P. 752; Fitzgerald *v.* Dressler, 7 C. B. N. S. 374; Blount *v.* Hawkins, 19 Ala. 100; Westmoreland *v.* Porter, 75 Ala. 452 (*semble*); Scott *v.* White, 71 Ill. 287; Bunting *v.* Darbyshire, 75 Ill. 408; Borchsenius *v.* Canutson, 100 Ill. 82; Luerk *v.* Malone, 34 Ind. 444 (qualifying Spooner *v.* Dunn, 7 Ind. 81); Conradt *v.* Sullivan, 45 Ind. 180; Crawford *v.* King, 54 Ind. 6; Mitchell *v.* Griffin, 58 Ind. 559; Parker *v.* Dillingham, 129 Ind. 542; Morrison *v.* Hogue, 49 Iowa, 574; Helt *v.* Smith, 74 Iowa, 667; Fish *v.* Thomas, 5 Gray, 45; Burr *v.* Wilcox, 13 All. 269; Hodgkins *v.* Heaney, 15 Minn. 185; Abbott *v.* Nash, 35 Minn. 451; Kansas Co. *v.* Smith, 36 Mo. Ap. 608; Rogers *v.* Emkie, 24 Neb. 653; Joseph *v* Smith, 39 Neb. 259; First Bank *v.* Dohm, 52 N. J. 363; Ludwick *v.* Watson, 3 Oreg. 256; Arnold *v.* Stedman, 45 Pa. 186; Landis *v.* Royer, 59 Pa. 95; Smith *v.* Exchange Bank, 110 Pa. 508; Bailey *v.* Marshall (Pa. 1896), 34 Atl. R. 326; Lampson *v.* Hobart, 28 Vt. 697; Cross *v.* Richardson, 30 Vt. 641; Templeton *v.* Bascom, 33 Vt. 132; Weisel *v.* Spence, 59 Wis. 301; Green *v.* Hadfield, 89 Wis. 138, *Accord.*

Warner *v.* Willoughby, 60 Conn. 471, *Contra.*

See 4 Harv. L. Rev. 290. — ED.

MALLORY v. GILLETT.

IN THE COURT OF APPEALS, NEW YORK, JUNE, 1860.

[*Reported in* 21 *New York Reports*, 412.]

COMSTOCK, Ch. J.[1] This case ought to be one of first impression. By the Statute of Frauds, all promises to answer for the debt of a third person are void unless reduced to writing. One Haines owed the plaintiff a debt for repairs on a boat, for which the latter had a lien on the chattel. In consideration of the relinquishment of that lien, and of forbearance to sue the original debtor, the defendant promised the plaintiff, without writing, to pay the debt at a certain future time. There is no pretence that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. The promise was, therefore, to answer for the existing and continuing debt of another, or, in the language of the books, it was a collateral promise. The consideration was perfect, but as there was no writing, the case seems to fall within the very terms of the statute. Authorities need not be cited to prove that the sufficiency of the consideration never takes a case out of the statute. Indeed, there can be no question under the Statute of Frauds in any case, until it is ascertained that there is a consideration to sustain the promise. Without that element, the agreement is void before we come to the statute. A naked promise is void on general principles of law, although it be in writing. The mere existence of a past debt of a third person will not sustain an agreement to pay it, unless there be forbearance to sue, or some other new consideration. In such a case, when we find there is a new consideration, we then, and not till then, reach the inquiry whether the agreement must be in writing. Such is this case. It is nothing to say that here was a new consideration. If such were not the fact, there would be no question in the case.

There is sometimes danger of error creeping into the law through a mere misunderstanding or misuse of terms. The words "original" and "collateral" are not in the Statute of Frauds, but they were used at an early day, — the one to mark the obligation of a principal debtor, the other that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented in these terms, the word "original" has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original, because they are new; and then as original undertakings are agreed not to be within the Statute of Frauds, so these new promises, it is often argued, are not within it. If the terms of the statute were adhered to, or a more discriminating use were made of

[1] Everything is omitted except the opinion of COMSTOCK, C. J. — ED.

S orally promised to pay debt of P if C wd relinquish lien on boat for value of services in repairing & forbear to sue P. Held w/ Stat.

words not contained in it, there would be no danger of falling into errors of this description.

What is a promise to answer for the "debt or default" of another person? Under this language, perplexing questions may arise, and many have arisen, in the courts. But some propositions are extremely plain; and one of them is, that the statute points to no distinction between a debt created at the time when the collateral engagement is made, and one having a previous existence. The requirement is, that promises to answer for the debt, etc., of a third person, be in writing. The original and collateral obligations may come into existence at the same time, and both be the foundation of the credit, or the one may exist and the other be created afterwards. In either case, and equally in both, the inquiry under that statute is, whether there be a debtor and a surety, and not when the relation was created. The language of the enactment is so plain that there is no room for interpretation; and its policy is equally clear. If A say to B, "If you will suffer C to incur a debt for goods which you will now or hereafter sell and deliver to him, I will see you paid," the promise is within the statute. This no one ever doubted. But if A say to B, "If you will forbear to sue C for six months on a debt heretofore incurred by him for goods sold and delivered to him, I will see you paid" — is not the case equally plain? So if, in such a case, instead of forbearance, there is some other sufficient consideration, for example, forgiving a part of the debt or relinquishing some security for it, the difference is still one of circumstance, but not of principle. In the case first put, the consideration of the guaranty is the original sale of the goods on the faith of it: in the other, it may be forbearance or the relinquishment of some advantage, the original debt still remaining. Looking at the comparative merit of these considerations, it would seem to be the highest in the first case, for the whole debt owes its origin to the collateral promise, while in the other the debt remains as before, and only some collateral advantage is lost. But the application of the statute depends on no such test. These considerations are, all of them, sufficient, and simply sufficient, to sustain the auxiliary undertaking. But if they also dispense with a writing, then, so far as I can see, there are no cases to which this branch of the Statute of Frauds can be applied.

Such an extreme position has not been taken; but it is said that the promise now in question need not be in writing, because it was new and original, and was founded on the relinquishment to the debtor of a security which the creditor held. To say that it was new and original, expresses no idea of any importance. Every promise is new and original that was never made before. An undertaking to answer for an old debt of a third person certainly has no more of originality than one to answer for a debt now contracted. As to the relinquishment of the lien or security, this, although a meritorious consideration, is, in judgment of law, no more so than any other which is sufficient to sustain a contract. Forbearance to sue has the same legal merit, and so has the release of a part of the debt.

There is nothing so remarkable or peculiar about this case that it may not be included in some general proposition which involves a principle of law. Now, one of these two propositions must, I think, be true: 1. The Statute of Frauds never applies to a promise, the subject of which is an antecedent debt of a third person to which it is collateral; or, 2. It applies to all such promises where the consideration moves solely between the creditor and original debtor, and the debt still remains. If the first is true, then the promise in question is valid without a writing, and so would any such promise be, without regard to the particular nature of the consideration; it being necessary, of course, that there should be some sufficient consideration. If the first be not true, and the second is, then the promise in this case is void, because it falls directly within it. The first proposition cannot be true, upon the plain terms and evident policy of the statute; and no such doctrine was ever asserted. The universal truth of the second one necessarily follows, unless the law will discriminate between different promises according as the consideration may differ in the particular nature or kind. But is such a discrimination possible, so long as, in any given case, the consideration is sufficient in the eye of the law, and moves solely between the original parties? No one, it seems to me, can hesitate to answer such a question in the negative. Yet we are told, without reason or principle, that when a creditor releases a security to the debtor, although without releasing the debt, a promise of another person, founded on that peculiar consideration, is not within the statute. The inevitable logic of such a proposition will include a like promise founded on any other consideration equally sufficient to sustain a contract; and, therefore, we are carried back to the first general proposition above stated, which is admitted to be false. It has already been observed, that, without a consideration, no question on the Statute of Frauds can arise.

In this elementary view of the question, I do not understand that much difference of opinion exists. It is claimed, however, that the course of adjudication has been such, that we cannot determine the case before us according to a consistent rule of law. This argument is founded in a misapprehension of the authorities, some reference to which will be necessary.

In this State, an early case, and one of very high authority, is that of Leonard *v.* Vredenburgh,[1] in which Chief Justice Kent divided the cases on this branch of the Statute of Frauds into three classes, as follows: 1. Where the promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the original credit. 2. "Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise." "Here," the Chief Justice observed, "there must be some further [or new] consideration shown, having an immediate respect to such liability; for the considera-

[1] 8 Johns. 29.

tion of the original debt will not attach to this subsequent promise. 3. Cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." "The two first classes," he further observed, "are within the Statute of Frauds, but the last is not." I suppose, in the light of later decisions, that the opinion of that great jurist, delivered in the case cited, may contain some inaccurate remarks respecting the right to prove a consideration for a collateral agreement where none appeared in the writing. It would be so considered, especially since the change we have made in the language of the Statute of Frauds, requiring the consideration to be expressed in the collateral instrument. But the above classification of the cases, and the connected remarks respecting each class, are strictly correct, and they have been a landmark of the law for forty years. Does the present case belong to the second class, which is within the statute, or to the third, which is not? Manifestly it belongs to the second, because that is a class where the undertaking is subsequent to the creation of the debt. It does not fall without that class in consequence of the newness of the consideration, because, the learned Chief Justice said, "here must be some further [new] consideration having an immediate respect to such liability." It cannot fall within the third class, because, if we arrange it there, we necessarily compress the two classes into one, or, more properly speaking, we merge the second wholly into the third. In such a disposition of the present question, no second class is left of collateral undertakings subsequent to the creation of the original debt, founded, as they must be, on some new or "further consideration."

The classification referred to, on a casual reading, is perhaps open to some misapprehension, and I think it has been occasionally misapprehended. What, then, is the true distinction between the second and third classes? They are both of them promises, in form at least, to pay the antecedent debt of a third person, and in that respect they are alike. The distinction, therefore, is in the *consideration* of the promises which belong to the two classes; not in respect to its particular nature or kind, but in respect to the parties between whom it moves. In the one class, the consideration is characterized as a "further one, having immediate respect to the [original] liability" of the debtor; in the other, as "new and original moving between the newly contracting parties." In the second class, the new or "further" consideration moves to the primary debtor. It may consist of forbearance to sue him, of a release to him of some security, or of any sufficient benefit to him or harm to the creditor, but in which the collateral promisor has no interest or concern. In the third class, the consideration, whatever its nature, moves to the person making the promise, and that also, as in all other cases of contract, may consist of benefit to him or harm to the party with whom he is dealing. This distinction is also extremely well expressed by Chief Justice Shaw, of the Supreme Court of Massachusetts. One class of cases (within the statute), he says, is "where the

direct and leading object of the promise is to become the surety or guarantor of another's debt;" the other class (not within the statute) is "where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own." Nelson *v.* Boynton.[1] Chief Justice Savage, in this State (Farley *v.* Cleveland[2]), made the same classification. "In all these cases," he observed, referring to those which fall within the third class, "founded on a new and original consideration of benefit to the defendant or harm to the plaintiff, *moving to the party making the promise*, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery." In one respect, this language of Chief Justice Savage has greater precision than that of Chief Justice Kent. The latter speaks of the consideration as "moving between the newly contracting parties." The former characterizes it as moving to the party making the promise. This description is more exact, as well as more comprehensive, because it includes a variety of cases found in the books, where the new consideration springs from the original debtor and not the creditor, as, for example, where the debtor, by conveyance of property or otherwise, places a fund in the hands of a third person, the latter promising, in consideration thereof, to pay the debt. But the difference is not one of principle, because there is a sense in which, even in such cases, the new consideration moves from the creditor through the debtor to the person making the promise, and on that ground many cases hold that the creditor may himself sue on the promise, although it was made to the debtor. Lawrence *v.* Fox.[3] Where the promise in this particular description of cases has been made directly to the creditor, the only question has been on the Statute of Frauds; and the rule is very properly settled that they are not within the statute. The cases of Farley *v.* Cleveland,[4] Gold *v.* Phillips,[5] and Olmstead *v.* Greenley[6] belong to this class.

Omitting, then, the first class of collateral undertakings — I mean those made at the same time with the creation of the debt — as having nothing to do with the present question, there are two kinds of promises of extensive use in the dealings of community, which, in form and effect, very much resemble each other; each being to answer for or pay a debt already due or owing from a third person, yet wholly different in respect to the motive and consideration. In the one class the promisor has no personal interest or concern, and his undertaking is made solely upon some fresh consideration passing between the creditor and his debtor. This class is within the statute. In the other, the promise may be in the same form, and, when performed, may have the same effect, but it is made as the incident of some new dealing in which the promisor is himself concerned, and upon a consideration passing be-

[1] 3 Metc. 396–400.
[2] 4 Cow. 432, 439.
[3] 20 N. Y. 268, and the cases cited.
[4] 4 Cow. 432, 439.
[5] 10 John. 412.
[6] 18 Id. 12.

tween the creditor or the debtor and himself. This class, which may include a great variety of particular examples, is not within the statute. The distinction is broad and intelligible, although the formal resemblance in such transactions may have occasionally led to inaccuracy of expression or decision. The great body of the cases, however, will be found to illustrate this distinction, and to establish it firmly as a guide in this branch of the law. If such a distinction were a questionable one, the tendency of the doubt would necessarily be in the direction of holding both classes of cases to be within the statute, but never in the direction of placing without the statute any one of the cases belonging to the first of these classes.

With this classification before us, it will be proper to notice more in detail the cases cited on the argument, and others not cited. . . .[1]

It cannot fail to be seen that nearly all the cases which have been mentioned, in fact all of them which exhibit a promise to pay or answer for the debt of another person, are essentially of one type. With great variety in the circumstances, one controlling characteristic pervades them all. In every instance, the consideration of the promise was beneficial to the person promising. This was the feature which imparted to the promise the character of originality, as that term is used with reference to the Statute of Frauds. In not one of them is it true that the undertaking was entered into upon a consideration merely beneficial to the debtor but of no concern to the promisor; and I can confidently say that not one of those cases contains even a *dictum* which, being understood, countenances the doctrine contended for on the part of the plaintiff in this case.

Yet it would not be true to say that the plaintiff's position is wholly unsupported by any authority in the courts of this State. In Mercein *v.* Andrus,[2] Savage, Ch. J., made this remark on a motion for a new trial: "The judge correctly stated to the jury that where the promise of one person to pay the debt of another was founded upon the consideration of surrendering up property levied on by an execution, the promise was an original undertaking, and need not be in writing to be valid." Of course, no such point was decided, because the decision granted a new trial upon another question not material to the present inquiry. The Chief Justice cited no authority. If he meant to lay down the doctrine, that a new consideration, moving from the creditor to the debtor, the debt still remaining, would sustain the unwritten promise of another person to pay the debt, there was no authority to be cited, for no such proposition had ever been advanced in this State. If, however, the charge at the trial and the observation of the Chief Justice assumed, as

[1] The learned judge here discussed Gold *v.* Phillips, 10 Johns. 412; Bailey *v.* Freeman, 11 Johns. 221; Nelson *v.* Dubois, 13 Johns. 175; Myers *v.* Morse, 15 Johns. 425; Olmstead *v.* Greeley, 18 Johns. 12; Farley *v.* Cleveland, 4 Cow. 432; Chapin *v.* Merrill, 4 Wend. 657; Gardiner *v.* Hopkins, 5 Wend. 23; Elwood *v.* Monk, 5 Wend. 235; King *v.* Despard, 5 Wend. 277; and Meech *v.* Smith, 7 Wend. 315. — ED.

[2] 10 Wend. 461.

the law was, that the levy of an execution extinguished the debt, and that the release of the levy remitted the creditor to the new promisor as his only remedy, then the remark was strictly correct, but it has no application to this case. Such is probably the true explanation; and we shall presently see there are English cases under the statute standing on that ground. The plaintiff's counsel has been able, however, to cite one case which is entirely to his purpose. In Fay v. Bell,[1] the plaintiff had a lien on a pair of boots which he had mended, and in consideration of releasing that lien and giving up the boots, the defendant promised to pay his demand, which amounted to fifty cents. So far as appears, the debt still remained. The case went up from a justice's court, through the Common Pleas, to the Supreme Court, where the question was disposed of with the single observation that the promise was "a new undertaking, founded on a new and distinct consideration, the relinquishment by the plaintiff of his lien on the boots, and which was sufficient to uphold the promise made." The remark, as made, is strictly true. The consideration was clearly sufficient to uphold the promise, but the Statute of Frauds requires not only a consideration but a writing. The case was of very slight importance, and the principles of the question were not examined. In the same book is another case, precisely the other way, the opinion being given by another judge. In Van Slyck v. Pulver,[2] the promise was made in consideration that the plaintiff would suspend proceedings on an execution against his debtor. This forbearance was admitted to be a sufficient consideration, and it was certainly a new one; but the promise was held void within the statute.

In all the judicial history of this State, then, there is but one adjudged case which sustains the doctrine contended for, and that is one entitled to no great consideration. I will now refer to several of a very decisive character, which furnish a true exposition of the statute, and show that the rule is the other way. . . .[3]

These numerous authorities are decisive. They all present examples where the collateral undertaking was founded on a consideration sufficient to sustain the promise, but of no personal concern to the promisor; yet the promises were void, because they fell within the precise terms and the undoubted policy of the Statute of Frauds. Certainly, that statute was not enacted for cases where the promise would be void at the common law for want of a consideration to sustain it. If it was not enacted for the very cases where a new consideration arises, additional to the original debt, that being insufficient according to all authority, then why was it ever passed? Indeed, the struggle in the courts has been to withdraw from its influence, not such cases as these, but others having a close formal resemblance, yet distinguishable, not because there is a

[1] Lalor's Supp. to Hill and Denio, 251. [2] Lalor, 47.

[3] The learned judge here discussed Simpson v. Patten, 4 Johns. 422; Jackson v. Rayner, 12 Johns. 291; Smith v. Ives, 15 Wend. 182; Packer v. Wilson, 15 Wend. 343; Watson v. Randall, 20 Wend. 201; Barker v. Bucklin, 2 Den. 45; and Kingsley v. Balcom, 4 Barb. 131. — Ed.

consideration, but because it moves to the promisor, and so gives to his undertaking an original character. A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well lie to pay another man's debt as to do any other act. The success of this struggle, in a variety of instances not within the intent of the statute, should not overthrow the very object for which it was enacted.

This discussion would be incomplete without referring to the rule elsewhere than in this State. I have already mentioned the case of Nelson *v.* Boynton,[1] which may be regarded as settling the question in Massachusetts. The creditor in that case sued his debtor and seized his property under an attachment. The defendant promised to pay the debt in consideration of a discontinuance of the suit. The suit was discontinued accordingly, and the lien of the attachment was thereby lost, but the debt remained against the original debtor. It was held, upon the fullest consideration, Chief Justice Shaw giving the opinion, that the promise was void because it was not in writing. I regard the decision as of great value, because the cases were examined, and the discrimination between the different classes was made with entire accuracy. . . .[2]

Without pursuing this discussion further, the general rule is, that all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. Such is the rule, because so is the Statute of Frauds. The statute makes no exception of any promise which is of that character. The courts have made no exceptions; as clearly they should not. But a considerable variety of undertakings, having points of resemblance and analogy to such promises, have been held not to be within the statute. These may be chiefly, if not wholly, arranged in the following classes: 1. Where there was no original debt to which the auxiliary promise could be collateral; for example, where the promisee was a mere guarantor for the third person to some one else, and the promisor agrees to indemnify him, or where his demand was founded in a pure tort. 2. Where the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, where such new undertaking is accepted as a substitute for the original demand, or where the original demand is deemed satisfied by the arrest of the debtor's body or a levy on his goods, the arrest or levy being discharged by the creditor's consent. 3. Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may

[1] 3 Metc. 396.

[2] The learned judge here discussed the decisions in the English courts, saying in conclusion: "I think it may be safely affirmed that no case has ever been determined in those courts tending to the proposition that a parol promise to pay the debt of another is valid when the consideration is beneficial only to the debtor, and where there is a debt which still remains against him." — Ed.

come from the debtor, as where he puts a fund in the hands of the promisee, either by absolute transfer or upon a trust, to pay the debt, or it may be in his hands charged with the debt as a prior lien, as in the case of Williams *v.* Leper, and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus, A, for any compensation agreed on between him and B, may undertake that C shall pay his debt to B. So A, himself being the creditor of C, may transfer the obligation to B upon any sufficient consideration, and guarantee it by parol. If we go beyond these exceptional and peculiar cases, and withdraw from the statute all promises of this nature, where the debtor alone is benefited by the consideration of the new undertaking, and the debt still subsists, then we leave absolutely nothing for the statute to operate upon.

The judgment should be affirmed.[1]

SELDEN, DENIO, CLERKE, and WELLES, JJ., concurred.[2]

[1] Clancy *v.* Piggott, 2 A. & E. 473; Rounce *v.* Woodyard, 8 Law Times, 186; Fennell *v.* Mulcahy, 8 Ir. L. R. 434; Dillaby *v.* Wilcox, 60 Conn. 71; Murto *v.* McKnight, 28 Ill. Ap. 238; Home Bank *v.* Waterman, 134 Ill. 461; Vaughn *v.* Smith, 65 Iowa, 579; Nelson *v.* Boynton, 3 Met. 396; Corkins *v.* Collins, 16 Mich. 478; Stewart *v.* Jerome, 71 Mich. 201; Walther *v.* Merrill, 6 Mo. Ap. 370 (*semble*); Cowenhoven *v.* Howell, 36 N. J. 323; Van Slyck *v.* Pulver, Hill & D. 47; Stern *v.* Drinker, 2 E. D. Sm. 401; Brown *v.* Weber, 38 N. Y. 187 (*semble*); White *v.* Rintoul, 108 N. Y. 222 (*semble*); Gump *v.* Halberstadt, 15 Oreg. 356 (*semble*); Gray *v.* Herman, 75 Wis. 453; Bray *v.* Parcher, 80 Wis. 16, *Accord.*

Houlditch *v.* Milne, 2 Esp. 86 (*semble*); Stewart *v.* Hinkle, 1 Bond, 506; Travis *v.* Allen, 1 St. & P. 192; Dunbar *v.* Smith, 66 Ala. 490; Prout *v.* Webb, 87 Ala. 593 (*semble*); Williams *v.* Hill, 3 Mack. 100; Allen *v.* Thompson, 10 N. H. 32; Robinson *v.* Gilman, 43 N. H. 485; Fay *v.* Bell, Hill & D. 251 (overruled); Adkinson *v.* Barfield, 1 McC. 575; Dunlap *v.* Thorne, 1 Rich. 213 (explaining Boyce *v.* Owens, 2 McC. 208), *Contra.*

It seems now to be everywhere agreed that a promise to a creditor to pay him the debt of another, in consideration of mere forbearance by the creditor, is within the Statute of Frauds. King *v.* Wilson, 2 Stra. 873; Fish *v.* Hutchinson, 2 Wils. 94; Tomlinson *v.* Gell, 6 A. & E. 564; Westmoreland *v.* Porter, 75 Ala. 452; Scott *v.* Thomas, 2 Ill. 58; Krutz *v.* Stewart, 54 Ind. 178; Jones *v.* Walker, 13 B. Mon. 356; Stewart *v.* Campbell, 58 Me. 439 (overruling Russell *v.* Babcock, 14 Me. 139); Thomas *v.* Delphy, 33 Md. 373; Dexter *v.* Blanchard, 11 All. 365; Musick *v.* Musick, 7 Mo. 495; Lang *v.* Henry, 54 N. H. 57; Duffy *v.* Wunsch, 42 N. Y. 243; Roe *v.* Barker, 82 N. Y. 431; White *v.* Rintoul, 108 N. Y. 222; Gump *v.* Halberstadt, 15 Oreg. 356; Caston *v.* Moss, 1 Bail. (S. Ca.) 14; Harrington *v.* Rich, 6 Vt. 666; Young *v.* French, 35 Wis. 111; Clapp *v.* Webb, 52 Wis. 638. — ED.

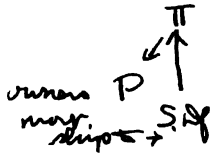
[2] BACON, J., delivered a dissenting opinion, in which DAVIES and WRIGHT, JJ., concurred.

Times v Foster

Owners of steams "Banks" owed money to π, steams being owned by McH & Co and some N.Y. people. McH mortgaged their interest to Δ. π heard that vessel was to be sold, & threatened to attach her, & then orally promised if π would not attach, that they would pay π's bill. π acts on this promise, loses it & brings libel if π gave up some aid he had for benefit of Δ, this would take it out of the statute, restrict for π.

Supreme sustaining exceptions. Promise does not lose its character as being within statute, because promisor receives some benefit thereby or avoids action in the performance to attack interest of N.Y. owners & that is not sufficient to take it out of statute.

Notice no action in q.c. would lie here.



ADAMS AMES *v.* T. P. FOSTER AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1871.

[*Reported in* 106 *Massachusetts Reports*, 400.]

MORTON, J.[1] The only question involved in this case arises under that clause of the Statute of Frauds which provides that no action shall be brought "to charge a person upon a special promise to answer for the debt, default, or misdoings of another, unless the promise, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or his agent." Gen. Sts. c. 105, § 1, cl. 2.

The plaintiffs in the original action claim to hold the defendant upon the ground of an express promise to pay the amount of a debt due the plaintiffs by the owners of the steamer "N. P. Banks," for wood and coal furnished prior to October 1, 1868. At this time, McKay & Aldus, of Boston, owned three-fourths of the steamer, and the other fourth was owned by parties in New York. In December, 1868, McKay & Aldus went into bankruptcy, having previously mortgaged their interest to the defendant Ames. In the spring of 1869 the plaintiffs heard that the steamer was to be carried to New York to be sold, and they threatened to attach her, and thereupon Ames promised to pay the bill if they would not attach her.

It is to be observed that Ames was not originally liable upon the bill, being merely a mortgagee. Howard *v.* Odell.[2] The plaintiffs do not claim that they had a lien upon the vessel. They had no right to attach the interest of McKay & Aldus, who were in bankruptcy. The only legal consideration, therefore, of the defendant's promise, was the forbearance of the plaintiffs to attach the interest of the New York owners. Upon this state of facts, the learned judge who presided at the trial instructed the jury that "if, for the benefit and at the request of Ames, the said Foster gave up or surrendered some advantage which he had, such as a means of collecting his debt or the like, and in consideration thereof Ames promised to pay this bill, he would be liable, although the promise was not in writing." We do not think that these instructions, applied to the facts of this case, were correct or sufficient. As we have seen, the only consideration of the defendant's promise was that the plaintiffs forbore to attach the interest of the New York owners; and we are of opinion that the jury should have been instructed that such promise was within the Statute of Frauds.

The defendant's promise was, in its primary and essential character, a promise to guarantee the debt of another. Its object was, to secure the payment of the old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist as long

[1] Only the opinion of the Court is given. — ED.

[2] 1 Allen, 85.

as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an entire absence of any liability on the part of the defendant or his property, except such as arises from his express promise. Forth v. Stanton.[1] When all these elements concur, we know of no case in this Commonwealth which sanctions the doctrine that such promise loses its character as collateral, and becomes an original promise, because there is a consideration which is beneficial to the promisor.

In Alger v. Scoville,[2] Shaw, C. J., says, that "it has been held that when the leading and obvious object of the promisor was to induce the promisee to forego some lien, interest, benefit, or advantage held by him, and to transfer that interest, or confer that or some equivalent benefit on the promisor, although the effect may be to discharge neither from an obligation, still it is a new, independent, and original contract between the parties, and is not within the Statute of Frauds required to be in writing."

In Curtis v. Brown,[3] Shaw, C. J., states that "it is no sufficient ground to prevent the operation of the Statute of Frauds, that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage has not also directly enured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has enured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right, or benefit in question."

It is equally true that it is no sufficient ground for taking the case out of the statute, that the defendant has received some benefit from the consideration of his promise. If this were so, then every promise to guarantee the debt of another, made upon a pecuniary consideration paid by the promisee to the promisor, would be taken out of the statute.[4] In all cases, the question is, whether the promise is in substance

[1] 1 Saund. (6th ed.) 211, note.

[2] 1 Gray, 391, 396.

[3] 5 Cush. 488.

[4] "Suppose A owes B $100; B pays C $10, in consideration of which C verbally promises to guarantee the payment of the debt. There are numerous decisions, some of which were pronounced by judges of high authority, going far enough to sustain an action upon this promise; yet it is very plain that this is squarely prohibited by the statute." Per Hibbard, J., in Lang v. Henry, 54 N. H. 57, 61.

"Suppose A delivers property to B, in consideration of his promise to become surety to him for the payment of a debt owing to him by C: the case is within the statute, because B's obligation, although upon a consideration received by him, is that of a surety only that C shall perform." Per Grover, J., in Brown v. Weber, 38 N. Y. 187, 191. — Ed.

a promise to pay the debt of another, or whether it is a promise by the promisor to pay his own debt, the extent of which is measured by the amount due by another.

We think the authorities in this State have gone no further than to decide that a case is not within the statute, where, upon the whole transaction, the fair inference is, that the leading object or purpose and the effect of the transaction was the purchase or acquisition by the promisor from the promisee of some property, lien, or benefit which he did not before possess, but which enured to him by reason of his promise, so that the debt for which he is liable may fairly be deemed to be a debt of his own, contracted in such purchase or acquisition. Nelson *v.* Boynton;[1] Fish *v.* Thomas;[2] Burr *v.* Wilcox;[3] Furbish *v.* Goodnow; Browne on St. of Frauds (3d ed.), § 214, *c*, *d*.

Applying this test to the facts of this case, it is clear that the promise of the defendant Ames was within the statute. It is true, or probable, that he indirectly received some benefit from the forbearance of the plaintiffs to attach the interest of the New York owners, but the purpose or effect of the transaction was not to transfer to him any lien or advantage. He acquired no rights which he did not before possess, and it is impossible to regard the promise as an original promise founded upon the consideration of a purchase by him. We are of opinion, therefore, that the jury should have been instructed in accordance with the request of the defendant Ames, that the plaintiff upon the facts found was not entitled to recover.

Exceptions sustained.[4]

D. W. PRIME and Another, Respondent, *v.* H. KOEHLER, Appellant.

In the Court of Appeals, New York, April, 1879.

[*Reported in* 77 *New York Reports*, 91.]

Andrews, J.[5] The defendant upon the conveyance to him [by Koehler] did not assume the payment of the mortgage [executed by Koehler to plaintiff Prime]. The mortgage was a lien upon the land, and his grantor was personally liable upon his bond for the mortgage debt, but the defendant did not become personally bound to pay the mortgage. After the defendant had taken the conveyance, default was made in the payment of interest, and this default having continued for more than thirty days, the principal sum by the terms of the mortgage became due at the option of the mortgagees. The defendant thereupon verbally agreed with the mortgagees that if they would not exact pay-

[1] 3 Met. 396. [2] 5 Gray, 45. [3] 13 Allen, 269.

[4] Winn *v.* Hillyer, 43 Mo. Ap. 139, *Contra.* — Ed.

[5] Only the opinion of the Court is given. — Ed.

ment of the principal, or foreclose the mortgage, and would give time for the payment of the interest then due, he would when the next instalment of interest became due, pay the interest then in arrear, together with that which should accrue to that time. The mortgagees assented to this arrangement, and took no proceedings to collect the mortgage debt or interest during the time specified in the agreement. This action is brought upon the defendant's promise to pay the two instalments of interest, and the only question is whether the undertaking on the part of the defendant was to answer for the debt, default, or miscarriage of another. If it is, not being in writing, it is void by statute. 2 Rev. Stat., 136, § 3.

It does not admit of doubt that the forbearance of the plaintiff to take proceedings to foreclose the mortgage upon the request of the defendant was a good consideration for his promise to pay the interest. Addison on Contracts, 12; Parsons on Contracts, vol. 1, p. 443. But if the defendant's promise was to pay the debt of another, the fact that it is supported by a good consideration will not save it from the condemnation of the statute. In addition, the promise must be in writing, and no matter what consideration exists, if the promise is collateral, a writing is the only competent evidence to establish it. Mallory *v.* Gillett. But the defendant's promise was not a promise to answer for the debt of another, within the meaning of the statute. When it was made, he had the legal title to, and possession of, the mortgaged premises. The mortgage had been reduced several thousand dollars by payments, and the defendant, by virtue of his ownership of the land, presumptively had an interest to protect it from sale on foreclosure. He was enabled by virtue of the agreement to take and control the rents and profits of the land during the time specified therein, and the plaintiffs meanwhile forbore to enforce their rights as mortgagees. The consideration of the defendant's promise was one running directly to him from the promisees. The agreement was entered into by the defendant for his own benefit, for the purpose of protecting his interest in the property covered by the mortgage. It was an arrangement with the lienors, for delay in enforcing their lien on the defendant's land.

The circumstances bring the case directly within the third class cases enumerated in Leonard *v.* Vredenburgh,[1] viz.: where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, running between the newly contracting parties. In this class of cases the subsisting liability of the original debtor is no objection to a recovery. And when the purpose of the promise is to secure a benefit to the promisor, by relieving his property from a lien, or securing and confirming his possession, the promise is original and not collateral, although a third person may be personally liable for the debt, and the promise may be in form a promise to pay such debt, and although the performance of the promise may result in

[1] 8 J. R. 28.

Prime v Koehler

One K. owned land & mortgaged it to π. K then conveyed land to Δ, who did not assume payment. On default, Δ promised to pay interest due at next instalment, if π would not foreclose. π did not, & now sues on Δ's oral promise to pay the two instalments. verdict for π below.

CT affirmed this. Δ's promise was not to answer for debt of K. for consideration ran directly to Δ, & the promise was ~~private~~ & unconditional — i.e. not conditioned on whether mortgagor paid or not — but it was conditional on mortgage being bound.

discharging the debt. Farley v. Cleveland, 4 Cow. 432; Mallory v. Gillett. The case of Mallory v. Gillett contains an able and elaborate review of the decisions upon the section of the statute we are now considering, and the opinion of Comstock, C. J., recognizes and enforces the distinction between promises to pay the debt of another, entered into for the benefit of the original debtor, and in aid of the original contract, and promises which though in form promises to pay the debt of a third person, are not made for the purpose of securing or performing the original duty, but for the benefit of the promisor, although such security or performance may be the consequence. In a learned note in 1 Sand. 211 C, it is said: "Whether a case comes within the statute depends not on the consideration of the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant, *or his property*, except such as arises from his express promise." We need not consider whether this statement of the doctrine is precisely accurate in all its parts, in view of the present state of the decisions, but it recognizes the validity of a verbal promise made under the circumstances of this case, and in that respect accords with the authorities before cited.

We think the judgment is right, and it should therefore be affirmed. All concur. *Judgment affirmed.*[1]

DAVIS v. PATRICK.

IN THE SUPREME COURT, UNITED STATES, NOVEMBER 9, 1891.

[*Reported in* 141 *United States Reports*, 479.]

THE plaintiff having obtained a verdict and judgment, the defendant alleges error in regard to the second count. That count is for the transportation of silver ore from the Flagstaff mine, in Utah Territory, to furnaces in Sandy, in the same territory.

The relations between Davis and the Flagstaff Mining Company were disclosed by a written agreement, of date December 16, 1873. By that agreement it appeared that Davis, on June 12, 1873, had advanced to the company £5,000, at the rate of six per cent. interest, a sum then due; that it had sold to Davis and agreed to deliver at the ore-house of the company, free of cost, 5,195 tons of ore, of which it had only then delivered 200 tons, although Davis had paid in full for the entire amount. The agreement also recited that Davis was to advance an additional amount, if needed, not exceeding £10,000. It then provided that the mine should be put under the sole management of J. N. H. Patrick, to be worked and controlled by him until such time as the ore sold had been delivered and the sums borrowed had been

[1] Fisk v. Reser, 19 Colo. 88, *Accord.* — ED.

repaid, with interest. This control was irrevocable, save at the instance of Davis. Coupled with this agreement was a full power of attorney to Patrick. The trial proceeded upon the theory that during the time the services sued for were being rendered, Davis was the party mainly and pecuniarily interested in the working of the mine, and that he assumed to Patrick a personal responsibillty for such services; and the real question tried was whether Davis's promises were collateral undertakings to pay the debts of another, and void because not in writing.[1]

MR. JUSTICE BREWER delivered the opinion of the Court.

That Davis was interested in having the ore transported to the furnaces is clear. He was interested in two respects: First, as to the 4,995 tons to be delivered to him at the ore-house, it being his property when thus delivered, any subsequent handling was wholly for his benefit; and in respect to the balance, as the transportation was one step in the process of converting the product of the mine into money, it would help to pay the debt of the company to him. Davis, therefore, was so pecuniarily interested in, and so much to be benefited by, the prompt and successful transportation of the ore, that any contract which he might enter into in reference to it was supported by abundant consideration. . . .[2]

Were these promises binding upon Davis, or of no avail to the plaintiff because not in writing? Were it not for the Statute of Frauds there would be no question, for obviously there was both promise and consideration. Defendant relies upon that provision of the Statute of Frauds which forbids the maintenance of an action "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. The purpose of this provision was not to effectuate, but to prevent, wrong. It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another. The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute

[1] The statement of the case has been slightly abridged.— ED.

[2] The Court here considered the evidence, finding it ample to prove repeated promises by the defendant to pay for the transportation. — ED.

promise; and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise. As said by this Court in Emerson *v.* Slater:[1] "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." To this may be added the observation of Browne, in his work on the Statute of Frauds, section 165: "The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself." The thought is, that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract enured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining company's debt to him; and as the mining company was apparently destitute of any other property, and the payment of its debt to Davis therefore depended upon the continued and successful working of this mine, and as the control and working of the mine had been put in the hands of Davis so that he might justly say, as he did, "I am practically the owner," it follows that he was a real, substantial party in interest in the performance of this contract. His promise was not one purely collateral to sustain the obligations of the mining company, but substantially a direct and personal one to advance his own interests. While the mining company was ultimately to be benefited, Davis was primarily to be benefited by the transportation of the ore, for thereby that debt, which otherwise could not, would be paid to him. He, therefore, in any true sense of the term occupied not the position of a collateral undertaker, but that of an original prom-

[1] 22 How. 28, 43.

isor, and it would be a shadow on justice if the administration of the law relieved him from the burden of his promise on the ground that it also resulted to the benefit of the mining company, his debtor.

Counsel for Davis place stress on the form of expression attributed by Patrick to Davis, to wit: "I will be personally responsible; I will see you paid;" and contends that the import of such language is that of a collateral promise. There is force in this contention, as it implies that some one else was also bound, but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise. Patrick declares he understood it to be a direct promise, and acted on the faith of it. That Davis understood it in the same way, is evidenced not only from the circumstances surrounding the parties at the time, but from the fact that in a subsequent interview, when charged to have always promised to pay this debt, he admits that he believes that he did. The plaintiff, believing that Davis was, as he said, practically the owner, the party primarily to be benefited by the conversion of the products of the mine into money, understood that Davis was making an original promise to pay for the work which he might do, and upon such promise he might surely rely as an original promise, at least for any work done thereafter.

The merits of the case, therefore, as disclosed by the testimony were with Patrick, and the judgment in his favor was right. It is objected that the Court in its instructions spoke of Davis as an original promisor, as one promising to pay the debt, and not as one promising to be responsible for the debt, or to see it paid. But as Davis in the second conversation promised to pay, and in the third admitted that he had always promised to pay the debt, we cannot think that the Court misinterpreted the scope and effect of his words. It is not probable that the parties to this transaction understood the difference between an original and a collateral promise. We must interpret Davis's promises in the light of the surroundings, and of his subsequent admissions, and in that light we cannot think that the Court erred in its construction thereof; and if the jury believed that he had made such promises, we cannot doubt that the verdict should have been as it was.

Affirmed.[1]

[1] See also Emerson *v.* Slater, 22 How. 43; Patton *v.* Mills, 21 Kas. 163; Winn *v.* Hillyer, 43 Mo. Ap. 139; Wills *v.* Cutler, 61 N. H. 405; Muller *v.* Riviere, 59 Tex. 640.

In a few cases it has been held that a promise, in consideration that the plaintiff would work for or supply goods to the promisor, to pay both for the work or the goods, and also for work done or goods sold to A, is not within the Statute of Frauds. Clifford *v.* Luhring, 69 Ill. 401; Fitzgerald *v.* Morrissey, 14 Neb. 198; Morrissey *v.* Kinsey, 16 Neb. 17 (*semble*); Wills *v.* Cutler, 61 N. H. 405; Crawford *v.* Edison, 45 Oh. St. 239; Muller *v.* Riviere, 59 Tex. 640. But see *contra*, Andre *v.* Bodman, 13 Md. 241; Gill *v.* Herrick, 111 Mass. 501; Ruppe *v.* Peterson, 67 Mich. 437. (But see McLaughlin *v.* Austin (Mich. 1895), 62 N. W. R. 719.) Belknap *v.* Bender, 75 N. Y. 446; Birchall *v.* Neaster, 36 Oh. St. 331. — Ed.

Davis Patrick

Davis v Patrick

A mining Co owned money, so they agreed that Co should deliver 5195 tons of ore free of cost to Davis. Minerals to be put under sole management of [illegible] management to be irrevocable ex cept at option of Davis. P worked & alleged that D had said "I will see you paid" for wages. P sues for wages.

Not allowed recovery. Case may be technically within the statute, but an exception is allowed where the main purpose is to subserve some business of one's own [illegible] & to mining for benefit of [illegible] & hence was to have judgment for P.

It would seem that promise of Davis here was absolute & unconditional & hence result is it.

Mining Co — Davis

Davis

Patrick

H. RAABE AND ANOTHER v. A. C. SQUIER AND OTHERS.

IN THE COURT OF APPEAL, NEW YORK, DECEMBER, 1895.

[*Reported in* 148 *New York Reports*, 81.]

HAIGHT, J.[1] The facts then as disclosed by the evidence are substantially as follows: Jencks and Stokes were the owners of the premises. Squier and Whipple were building the houses thereon for them. Squier and Whipple entered into a contract with the plaintiffs to furnish the woodwork for the houses for the sum of $20,000. The payments were to be made in instalments in cash, less ten per cent discount on the delivery of the material at the buildings. The contract specifically designated the material to be delivered upon each instalment. The plaintiffs prepared the first instalment of material, and delivered the same at the buildings, and then called upon the defendants, Squier and Whipple, for the first payment due them under the contract, but the same was delayed and not made for the space of about three months. The plaintiffs prepared and delivered the second instalment of material, and also demanded payment for that, which was neglected and delayed. The plaintiffs then prepared the rest of the material called for by the contract, but refused to deliver the same until the instalments furnished by them had been paid for. Under these circumstances the defendants Jencks and Stokes saw the plaintiffs and told them that they were the owners of the buildings; that they wanted them finished, and that if the plaintiffs would go ahead and deliver the rest of the material they would see them paid therefor; that if Squier and Whipple did not pay, they would take it out of the amount going to them, and would pay the plaintiffs. It further appears that, relying upon this promise, the plaintiffs proceeded and delivered all the material called for by the contracts, but that the sum of $2,800 still remains due to them and unpaid.

The referee dismissed the complaint as to Jencks and Stokes upon the ground, as he says, that their promise to pay, being oral, was void under the Statute of Frauds.

As to the Statute of Frauds, it appears to us that its provisions have no application to the case under consideration. In the first place the indebtedness at the time the promise was made has been paid. The promise, in so far as it is here sought to be enforced, related to the indebtedness thereafter to be created. The promisors were the owners of the buildings in process of construction. The woodwork furnished by the plaintiffs was for their benefit. The contractors had neglected to pay the plaintiffs for the material furnished, and they refused to deliver more, as they had the right to do. Under such circumstances

[1] Everything is omitted except so much of the opinion as relates to the liability of the defendants, Jencks and Stokes. — ED.

the promise was made, and it was in reliance upon the promise that the plaintiffs delivered the rest of the woodwork. The promise thus made was original and founded upon a new consideration, that of the goods. It was beneficial, as we have seen, to the promisors, thus bringing the case within the rule stated by Finch, J., in White *v.* Rintoul,[1] in which he says: "Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." Ackley *v.* Parmenter;[2] Prime *v.* Koehler; Bayles *v.* Wallace.[3]

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur. *Judgment reversed.*[4]

WOOD *v.* BENSON.

IN THE EXCHEQUER, MICHAELMAS TERM, 1831.

[Reported in 2 Crompton & Jervis, 94.]

ASSUMPSIT by the clerk of the Manchester Gas Works, on the following guaranty, signed by the defendant: —

"I, the undersigned, do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. Neville; and I do also engage to pay for all arrears which may be now due. Witness my hand, this 10th day of August, 1830."

There was a count for gas and goods sold and delivered. Plea, the general issue.

At the trial, before PARKE, J., at the last summer assizes for the county of Lancaster, it appeared that £13 15*s.* 6*d.* was due for arrears, and £15 4*s.* 6*d.* for gas supplied after the guaranty was given. It was objected that there was no consideration apparent on the face of the instrument for the promise to pay the arrears; and that the agreement, therefore, being void as to part under the Statute of Frauds, was void as to the whole.

The learned judge directed the jury to find a verdict for the plaintiff for £29, and gave the defendant leave to move to enter a nonsuit.

Joshua Evans accordingly obtained a rule to enter a nonsuit.

Wightman showed cause.[5]

[1] 108 N. Y. 222, 227. [2] 98 N. Y. 425. [3] 56 Hun, 428.

[4] See *contra*, Rand *v.* Mather, 11 Cush. 1; Noyes *v.* Humphreys, 11 Grat. 636. — ED.

[5] The arguments of counsel are omitted, together with the concurring opinions of BAYLEY, GARROW, and BOLLAND, BB. — ED.

Raak v Squires Jericho & Stokes

Δs were building house, & S & W were contractors. S & W they bot wood for houses from Π's, payments to be made in instalments. They were slow about paying, & Π's refused to deliver more until money was paid & Δ's then orally promised that they would see Π's paid, if they would deliver, & if necessary would take it out of money due S & W. Π's delivered & now sue. Lowe et non suited Π's on ground of Statute of Frauds

Upon et moved a new trial. Statute has no application here because a new consideration was coming to Δ's, in return for delivery of goods.

Terms of promise here seem to show that it was a promise to pay in any event.

Wood v Benson

Δ signed paper whereby he promised to pay for all gas used before that date by his brother, & also all gas to be used in future. Court for gas sold. Δ set up defense that no consideration was expressed. Lower ct gave judgment for Π.

Held that consideration need to be expressed, & that the only consideration here was for promise to pay for gas to be used. Since Π only allowed recovery for gas to be used.

LORD LYNDHURST, C. B. The case of Thomas v. Williams[1] may, as it appears to me, be supported. Part of the contract in that case was void by the Statute of Frauds. The declaration stated the entire contract, including that part of it which was void; and therefore the contract, as stated in the declaration, was not proved.[2]

The same observation applies to Lexington v. Clarke and Chater v. Beckett; and I have no disposition to complain of those decisions, because in none of those cases does there appear to have been any count upon which the plaintiff could recover.

But the question in the present case is widely different. The contract resolves itself into two parts. One is, "I engage to pay for all the gas which may be consumed," etc.; that is a distinct engagement. The other part is, "and I do also engage to pay all arrears," etc. Now, this latter part cannot be sustained; for if it be a distinct engagement, there is no consideration to support it expressed on the instrument.

The question, then, is, if I undertake to pay for goods which may be supplied, though there is no promise to supply the goods, whether, when the goods are supplied, a right of action does not accrue to recover the amount. It is quite clear that it does. And though the latter part of the engagement cannot be sustained, under the first part of the engagement the plaintiff is entitled to recover for the gas subsequently supplied; and therefore the verdict must stand for £15 4*s.* 6*d.*[3]

Rule discharged as to entering a nonsuit, the verdict to be reduced to £15 4*s.* 6*d.*

[1] 10 B. & C. 664.

[2] The plaintiff declared specially on an oral promise to pay rent due from A and rent to become due from himself. Not being able to prove the entire promise, he failed altogether. The plaintiff was unsuccessful for the same reason in Lexington v. Clarke, 2 Vent. 223; Chater v. Beckett, 7 T. R. 201; Noyes v. Humphreys, 11 Grat. 636. — ED.

[3] In the course of the argument, Thomas v. Williams being cited in support of the objection of variance, Bayley, B., said: "In the present case the same objection would have applied on the first count of the declaration, and would have been fatal if there had not been a good count on which the subsequent supply could be recovered; but the objection would have been on the ground that the plaintiff was bound to prove all the promise which he had stated, and not on the principle that if a promise be void in part it must necessarily be void *in toto*."

In accordance with the principal case, see Rand v. Mather, 11 Cush. 1 (overruling Loomis v. Newhall, 15 Pick. 159).

REQUISITES OF MEMORANDUM. It was decided in Wain v. Warlters, 5 East, 10, that the memorandum of an agreement to answer for the debt, default, or miscarriage of another was insufficient, if it did not disclose the consideration for the promise as well as the promise itself. This strict, not to say narrow, interpretation of the statute continued to be followed, as in the principal case, until the passing of the statute 19 & 20 Vict. c. 97, by which the memorandum was to be deemed sufficient, even though the consideration for the promise did not appear in writing or by necessary inference from a written document. In this country the decisions are hopelessly irreconcilable, many following and many departing from the doctrine of Wain v. Warlters. The learned reader will find a full collection of the authorities in Browne, Statute of Frauds (5th ed.) §§ 390, 391. — ED.

RANDALL v. RIGBY.

IN THE EXCHEQUER, TRINITY TERM, 1838.

[*Reported in 4 Meeson & Welsby*, 130.]

THE declaration stated that heretofore, to wit, on the 17th of October, 1837, in and by a certain indenture then made between the plaintiff of the first part, William Brookes of the second part, and Richard Hollins and the defendant of the third part, the counterpart of which, &c., certain land and premises were granted, bargained, sold, aliened, enfeoffed, and confirmed unto the said Richard Hollins and the defendant, their heirs and assigns, to hold the same unto the said Richard Hollins and the defendant, and their heirs, to the use, intent, and purpose that the plaintiff, his heirs and assigns forever, should and might, out of the said land and dwelling-houses, and other buildings erected thereupon, with the appurtenances, receive and take one clear yearly rent or sum of £63 of lawful money of Great Britain, to be payable half-yearly, free from all deductions whatsoever; and to the further uses, intents, and purposes in the said indenture mentioned; and the said defendant did by the said indenture, for himself and his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the plaintiff, his heirs and assigns, that they, the said Richard Hollins and the defendant, their heirs, executors, administrators, and assigns, or some or one of them, should or would forever thereafter well and truly pay or cause to be paid unto the plaintiff, his heirs and assigns, the said yearly rent of £63 by the said indenture limited in use to him or them, on the days and times thereinbefore appointed for payment thereof, and hereinbefore mentioned, without any deduction or abatement whatsoever; and the plaintiff saith, that after the making of the said indenture, to wit, on the 25th of March, 1838, which day elapsed before the commencement of this suit, a large sum of the yearly sum or rent aforesaid, to wit, £31 10*s*. became due to the plaintiff, according to the said covenant aforesaid, for one-half of a year ending on the day and year last aforesaid and then last elapsed; and the plaintiff further saith, that the said Richard Hollins was then and thence to the commencement of this suit alive. Breach, that neither Hollins nor the defendant paid, but therein made default, contrary to the said covenant of the said defendant, whereby an action hath accrued to demand the sum of £31 10*s*.

General demurrer, and joinder.

The cause of demurrer stated in the margin by the defendant was, that according to the authorities, debt will not lie for the arrears of a rent or annuity in fee.

Wightman, in support of the demurrer. Taking the whole indenture together, this is the grant of an annuity payable out of land; the covenant is a mere collateral security; and the general principle estab-

Randall v Rigby

land was sold to 3d person by Π. with an annual rent reserved, payable half yearly, & Δ covenanted to pay this as rents, altho covenant was absolute in form, i.e. 3d person & Δ jointly mortgaged. Π brings action of debt to recover. demurrer

Ct gave judgment for Δ. wrong form of action was used here, for it should have been covenant & not debt. It is not a covenant to perform a direct duty, but only conditional in effect.

lished by Webb *v.* Jiggs[1] was, that at common law debt does not lie for the arrears of an annuity payable out of lands for life or a greater estate, while the estate of freehold continues. [LORD ABINGER, C. B. The annuity is charged on land in the hands of one person, and another person covenants to pay. The terre-tenant ought therefore to pay the annuity in the first instance, and the covenantor is not liable unless he refuses; that is not a debt, but only a duty on failure of payment by the terre-tenant.] Covenant might possibly lie against the defendant, but not debt; his covenant is merely collateral.

Crompton, contra. This is a collateral covenant in gross, on which an action may be maintained without reference to privity of estate. [PARKE, B. — How do you distinguish this from the case of a lease, with a covenant by the lessor, his executors, administrators, and assigns, to pay the rent, and the lessee assigning, and the lessor accepting the assignee as his tenant? — the cases are clear that the lessor, or the assignee of the reversion, may bring debt against the assignee on the privity of estate, but can only bring covenant against the lessee, because the privity of estate is determined as to him, and the covenant becomes collateral: 1 Siderf. 402; Mills *v.* Auriol.[2]] Those are cases where the question arose how far debt will lie when the previous privity of estate has determined; this is a mere express covenant between strangers, which in its inception was collateral, and never had anything to do with the estate.

Wightman, in reply. Cooke *v.* Herle[3] is an express authority that the covenant is collateral. The effect of it is, "I, the defendant, will take care that this annuity, which issues out of land, shall be paid." If it had been merely a covenant by both these parties to pay a sum in gross, debt might have lain, although it was intended to secure the annuity; but it is a covenant to pay the annuity, which issues out of land. The primary duty is not that the defendant shall pay in the first instance; his duty is to take care that it is paid out of the land. But the first principle in an action of debt is, that there must be a direct duty to pay.[4]

LORD ABINGER, C. B. I think Mr. Wightman has drawn the true distinction. The question here is not whether the defendant is liable, but whether he is liable in this form of action. If it had appeared that this was a debt of his own, on which he was liable to the plaintiff, debt might be maintainable as well as covenant; but it is an action on a mere collateral covenant, by which the defendant, jointly with another, undertakes to secure the payment of an annuity which is issuing out of land. The case of a lessee who has assigned his lease is strictly analogous. In Mills *v.* Auriol, Wilson, J., sums up the position of a lessee under such circumstances in these words: "An action of covenant remains after the estate is gone; but, generally speaking, when the land is gone, the action of debt is also gone, debt being

[1] 4 M. & Selw. 114. [2] 2 H. Bl. 433. [3] 2 Mod. 138.

[4] The arguments of counsel are somewhat abridged. — ED.

maintainable because the land is debtor. Covenant is founded on a privity collateral to the land." The same point had been decided in Thursby *v.* Plant.[1] The defendant here stands in the same relation to the plaintiff as the original lessee after assignment of the estate, when he is only suable in covenant, not in debt.

PARKE, B. I am of the same opinion. No doubt this covenant is collateral or in gross in one sense, that it does not run with the land or rent; for that Milnes *v.* Branch[2] is an authority; but it is also collateral in the sense contended for by Mr. Wightman, that it is not a covenant to perform any direct duty, but only a collateral one to secure payment of the rent. Upon this undertaking an action of covenant is the proper remedy; in which the plaintiff will recover, by way of damages, the amount actually in arrear. The case falls therefore within the principle of the authority referred to in Viner's Abridgment, and ranges itself also with that of the lessor and lessee after assignment of the estate, as decided in Thursby *v.* Plant, and in Mills *v.* Auriol. This covenant is collateral in that sense also, and is not like a covenant to pay a sum of money, which becomes a direct duty from the defendant to the plaintiff.

BOLLAND and ANDERSON, BB., concurred.

Judgment for the defendant.

[1] 1 Siderf. 401; s. c. 1 Saund. 230; and see p. 241, n. 5.
[2] 5 M. & Sel. 411.

SECTION II.

Suretyship in the Form of an Independent or Absolute Undertaking.

SISON *v.* KIDMAN.

IN THE COMMON PLEAS, JANUARY 26, 1842.

[*Reported in* 11 *Law Journal Reports, Common Pleas*, 100.[1]]

THE plaintiff declared in debt against the defendant, as maker of a promissory note for £15, payable to the plaintiff or order, value received.

Plea: that the defendant was charged in the declaration as the principal and single party to the note, but that the note was the joint and several note of the defendant and one Watts, and that the defendant signed the note together with Watts, to secure a sum of money, which was and still is the proper debt of Watts, and that no part whatever of the said debt was the proper debt of the defendant, and that there was no consideration for the note as between the plaintiff and defendant.

Replication: that there was a sufficient consideration for the making of the said note by the defendant.

Demurrer and joinder.

This case was argued by —

Stephens, Sergt., in support of the demurrer. The question as raised in the pleadings is whether debt will lie in this case. The plea discloses facts which show that there was no consideration between these parties: there was, therefore, no privity between them. The contract was collateral.

[ERSKINE, J. On the face of the note, one maker is liable as much as the other.]

That may be so; but the plea discloses the real nature of the transaction. The defendant is not liable till Watts has first made default; and therefore, though *assumpsit* might be maintained, debt will not lie. It was open to the defendant to show the effect and nature of the consideration in the plea. Foster *v.* Jolly;[2] Clarke *v.* Wilson;[3] Abbott *v.* Hendricks.[4]

[MAULE, J. How can you call the liability on the note a collateral liability?]

Because the original debt was due from another party.

[1] 3 M. & Gr. 810, s. c. — ED.
[2] 1 Cr. M. & R. 703.
[3] 3 Mee. & Wels. 208.
[4] 1 Man. & Gr. 791.

[MAULE, J. Suppose the defendant had been the sole maker of the note, could you go into the nature and origin of the consideration?]

It is shown that another party was primarily liable upon it.

[TINDAL, C. J. Suppose the action had been *assumpsit*, would it have been any defence to show that the other party had not been sued upon it? If not, it cannot be considered as a mere guarantee.]

In Milton's Case,[1] which was cited and relied on in the judgment in Priddy *v.* Henbrey,[2] it was decided that debt did not lie by the payee against the acceptor of a bill of exchange, drawn by a third person, on the ground that he that drew the bill continued the debtor; and that there was, therefore, no privity between the payee and acceptor. Here Watts continued the debtor.

[ERSKINE, J. But here you have a direct contract between the plaintiff and defendant, on the face of the note.]

So there is between the payee and acceptor of a bill of exchange.

[TINDAL, C. J. Not an original contract.]

In Randall *v.* Rigby, lands were enfeoffed to A. B., to the use that the plaintiff and his heirs should receive and take out of them a yearly rent of £63, and the defendant covenanted with the plaintiff that A. B. should pay the said yearly rent on the days and times agreed on; and it was held that debt would not lie by the plaintiff against the defendant for the arrears of the rent.

[MAULE, J. In that case, the defendant was only to pay in default of another party. I think this case is more like that of Evans *v.* Jones.[3]]

The case in Siderfin, p. 402, referred to by Parke, B., in Randall *v.* Rigby, and also the cases of Browne *v.* London,[4] and Bishop *v.* Young,[5] are authorities in favor of the objection.

[TINDAL, C. J. When the defendant became a party as maker to a promissory note in favor of the plaintiff, he entered into an immediate contract, which raised a privity between the plaintiff and himself, or, in other words, he took the debt on himself. I see no ground whatever for holding that debt will not lie in this case; and I think that a good consideration is shown, even on the face of the plea.

The rest of the Court concurring, *Judgment for the plaintiff.*

[1] Hard. 485.
[2] 1 B. & C. 675.
[3] 5 Mee. & Wels. 295.
[4] 1 Vent. 152.
[5] 2 B. & P. 78.

C, holder of note sues sole D, S, in debt as maker of note. Plea that D was joint maker with P who was real debtor, & whose debt was secured by this note. Demurrer Overruled. D made debt his own by immediate Contract with C.

P signed acceptance of bill in favor of C by way of payment & S voluntarily signed as cautioner expressly for him. C sues them jointly
Held: S liable on promise.

CATHERINE MACDOUGALL *v.* DAVID FOYER.

IN THE COURT OF SESSION, SCOTLAND, FEBRUARY 13, 1810.

[*Reported in* 15 *Faculty Decisions*, 579.]

MALCOLM MACFARLANE being indebted to Catherine Macdougall, his mother, he and John Mitchell and David Foyer subscribed a bill in the following terms: —

CARNCABER, 3d January, 1805.

£. 1300 Principal.
65 Interest.

£. 1365.

Jointly and severally against the term of Martinmas first to come, at Messrs. Carrick and Company's banking-office in Glasgow, pay to me, Catherine Macdougall, widow of the deceased Donald Morison, or order, thirteen hundred and sixty-five pounds Sterling, value of

her
CATHERINE X MACDOUGALL.
mark.

To Messrs. Macfarlane in Carncaber, and John Mitchell in Arrochymore, acceptants.

(Signed) MALCOLM MACFARLANE.
JOHN MITCHELL.

(Signed) DAVID FOYER in Blairvocke.
DAVID FOYER as cautioner for them.

Upon the death of Malcolm Macfarlane, the pursuer brought an action against his son George and the other acceptors, concluding that they should be ordained jointly and severally to make payment of the debt.

Mitchell and Foyer resisted payment of the bill. Mitchell's case was very untenable, and not much insisted in. For Foyer it was pleaded that an acceptance of a bill of exchange may be either absolute or conditional, partial or entire. Chitty on Bills, pp. 135–139; Kidd on Bills, pp. 74–78; Douglas, p. 286. That the bill was not addressed to him conjunctly and severally with the others: that he had written that part of the address himself, and had subscribed his acceptance expressly as cautioner: that the bill subscribed with that qualification had been received by the pursuer without any hesitation or difficulty, though she was quite entitled to have objected: that she must therefore be held to have looked on him as *subsidiarie* liable: and that therefore he was entitled to the *beneficium ordinis*, and had a right to insist on George Macfarlane being discussed before recourse could be had upon him.

The pursuer founded chiefly on the case of Sharpe against Harvey, 24th June, 1808; and pleaded that the decision there showed that,

quoad the creditor, a cautionary obligation could not be constituted at all by a bill, otherwise it must have been subject to the septennial prescription. She farther argued that the acceptance in this case was totally different from a conditional one; for there the creditor's right depended upon an event which might or might not happen; whereas here there was no doubt about the matter. It was not conditional, but merely cautionary, and would of course be of use in settling questions of relief among the co-obligants, but could have no effect upon the creditor in the bill.

THE LORD ORDINARY (25th November, 1808) decerned against the whole defenders conjunctly and severally.

After some farther procedure, the case came before the Court on petition and answers. The judges were clearly of opinion that cautionary obligations in bills of exchange could have no other effect than that of settling the question of relief, and on that ground (23d January, 1810) they adhered.

A reclaiming petition was (23d February, 1810) refused without answers.[1]

CASEY *v.* BRABASON.

IN THE SUPREME COURT, NEW YORK, SPECIAL TERM, APRIL, 1860.

[*Reported in* 10 *Abbott's Practice Reports*, 368.]

MOTION for a new trial.

This action was brought upon a promissory note, in the words and figures following, to wit: —

"$200.

"On or before two years, we jointly and severally promise to pay to Michael Casey, or his order, the sum of two hundred dollars. Given under our hands,

"JANUARY 8, 1856.

(Signed) "BERNARD MCCABE,
"*Catholic Pastor.*
"CHARLES J. BRABASON."

The defendant alleged in his answer that he signed the note as surety, and without consideration.

[1] "With the nature of a bill, a cautionary obligation is altogether incompatible; and in a question with the drawer or creditor, there can be no cautioner. A party subscribing incurs a joint and several obligation, and is not entitled to the benefit of discussion. The law, therefore, by which cautionary obligations are governed, totally fails in its application to such a case; neither is any injustice committed against the acceptor, because every one voluntarily subscribing either a bill or any other obligation, is presumed to know the legal consequences of the obligation which he has undertaken." By the Court in Sharp *v.* Henry, 2 Mor. Dict. Dec. Bill of Exchange, Appendix, No. 22. — ED.

The proof showed that the note was given for a debt of McCabe's, and that the defendant signed it as his surety, without receiving any consideration therefor.

The defendant insisted that he was not liable; but the judge held otherwise, and directed the jury to find for the plaintiff, to which decision and direction the defendant excepted. The jury rendered a verdict in favor of the plaintiff for $229.10.

The action was tried at the Chenango Circuit in February, 1860.

Defendant moved for a new trial on a case and exceptions.

The other points in the case need not be stated, as they were not deemed of sufficient importance for examination.

William H. Hyde, for plaintiff.

Horace Packer, for defendant.

BALCOM, J. The instrument in question is a valid promissory note; although it does not contain the words "for value received," or any words tantamount to them. Edwards on Bills and Promissory Notes, 56, 78; 1 Cow. 2d ed. 163.

The defendant's counsel does not deny but that McCabe was liable on the note; but he contends that the defendant is not liable on it, because he signed it as surety, and did not receive any consideration therefor. He insists that the Statute of Frauds applies to the case, and exempts the defendant from the payment of the note. The statute is that "every special promise to answer for the debt, default, or miscarriage of another" shall be void, unless the agreement containing such promise, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged therewith. 2 Rev. Stat. 135, § 2.

McCabe owed the plaintiff the money mentioned in the note; and the defendant, though in fact a mere surety, signed the note as principal, with McCabe. The note, therefore, was not a special promise by the defendant to answer for the debt, default, or miscarriage of McCabe.

I think the debt, for which the note was given, a sufficient consideration to uphold the note against the defendant as well as McCabe. The note, on its face, is an original undertaking of both of them.

If the defendant had indorsed the note for the accommodation of McCabe, instead of signing it as maker, he would clearly have been liable on it, if it had been duly protested for non-payment;[1] and I am unable to see why he is not liable on it as maker.

[1] Steele *v.* McKinlay, 5 App. Cas. 754, 770 (*semble*); Macdonald *v.* Union Bank, Court Sess. Cas. 3d Series, vol. 2, p. 963; Spann *v.* Baltzell, 1 Fla. 301; Turnbull *v.* Trout, 1 Hall, 336; Zellweger *v.* Caffe, 5 Duer, 87; Nelson *v.* Richardson, 4 Sneed, 307, *Accord*.

Crooks *v.* Tully, 50 Cal. 264, *Contra*.

If an indorser, knowing that he is discharged by the holder's failure to make due presentment or give due notice of dishonor, promises orally to pay the bill or note, his promise is not within the Statute of Frauds, being regarded not as a contract, but as a renunciation of a defence. See Uhler *v.* Farmers' Bank, 64 Pa. 406, and 1 Ames,

I am of the opinion that the Statute of Frauds does not apply to the case, and that the jury were properly directed to find a verdict in favor of the plaintiff for the amount of the note.

The point that the defendant supposed he was only signing his name to the note as a witness when he wrote it is untenable; for his answer concedes he signed it as surety.

I think there was no question for the jury upon the evidence; and that the defendant's motion for a new trial should be denied, with $10 costs.[1]

M. R. P. MANLEY, Administratrix, v. N. T. GEAGAN.

In the Supreme Judicial Court, Massachusetts, October Term, 1870.

[*Reported in* 105 *Massachusetts Reports*, 445.]

Contract by the administratrix of Edwin Manley upon an oral promise to pay the following order: "Fall River, October 9, 1868. Nicholas T. Geagan, Sir: Please pay to Edwin Manley thirteen hundred and fifty-four dollars for work on your house, corner of Bedford and Twelfth Streets, and charge the same to account of

"H. B. Borden & Co."

The answer denied all the plaintiff's allegations, and pleaded want of consideration, and the Statute of Frauds.

The trial was in the Superior Court, without a jury, before Pitman, J., who made the following report of the case for the determination of this Court: —

"The plaintiff proved that her intestate, in whose favor the order was drawn, did work as a stone-mason on a block of buildings belonging to the defendant, and which he was then erecting, prior to the time of drawing this order. It appeared that the whole contract was taken by H. B. Borden & Co., who employed the plaintiff's intestate to do the mason-work, and that there was no contract between the plaintiff's intestate and the defendant, and no employment by the defendant; that after the work was done the defendant sent word to the plaintiff's intestate to get an order from Borden & Co. on him; adding, 'I am going to pay all off on the 10th, and am not going to trust Borden & Co. to pay it; I am going to see the help all paid;' and that this was

Cases on Bills and Notes, 506. But see *contra*, Peabody *v.* Harvey, 4 Conn. 119, and Huntington *v.* Harvey, 4 Conn. 724. By statute, in some jurisdictions, the waiver must be in writing. Thomas *v.* Mayo, 56 Me. 40. — Ed.

[1] Davidson *v.* Rothschild, 49 Ala. 104; Lehman *v.* Levy, 69 Ala. 48; McGill *v.* Dowdle, 33 Ark. 311; Nichols Co. *v.* Dedrick (Minn. 1895), 63 N. W. R. 1110; Frech *v.* Yanger, 47 N. J. 157; Paul *v.* Stackhouse, 38 Pa. 302, *Accord*. — Ed.

Casey v Brabason

Δ signed a joint & several note for a debt which was not his. No consideration was stated in the note. Δ claimed that he was not liable on note & at jury judgment for Π. Δ has signed it as joint maker & it is hence not a promise to answer for the debt of another. Date of note need not be stated.

Hartley v Grayson

Π's intestate was employed by Borden who was a contractor for Δ. Δ told Π to get an order from B, saying he would then accept it, & pay all off. Π got a bill of exchange from B, but Δ could not be found to accept it & refused late to accept. Lower ct held that Π could not recover, Δ's promise being within statute. Ct ruled that Π could recover, it being a promise to answer for debt of another.

But isn't Δ promising to pay at all events? He says he won't trust Borden, or at least it is a promise to pay what Borden shall pay as amt due.

communicated to the intestate; that the next day he procured the order in suit and presented it to the defendant; that the defendant took it, read it, said it was all right, and that he would accept it, and pay it on Monday; that on Monday he could not be found, was gone out of town for a week, and has since refused to pay it. The defendant, who was called as a witness by the plaintiff, testified that he owed H. B. Borden & Co. nothing at the time when this order was presented; and I find as a fact that it is not proved that he actually did owe them anything. The defendant offered no evidence.

"Upon the above, the Court ruled that the promise of the defendant, being an oral promise to pay the debt of another, and being also without any consideration, no action could be maintained on it, and thereupon found for the defendant. If this ruling is wrong, a new trial is to be had; otherwise, judgment on the verdict."

J. C. Blaisdell, for the plaintiff.

J. M. Morton, Jr., for the defendant.[1]

GRAY, J. The promise of the defendant was to pay for work already done by the intestate for Borden & Company, without any previous contract with or employment by the defendant. The defendant owed Borden & Company nothing, and received no consideration, either from Borden & Company or from the intestate for his promise. The intestate neither did any work nor paid any money upon the faith of this promise, nor gave up any right or security against Borden & Company. Their original liability to him was not altered or affected by the defendant's promise. This promise was therefore clearly a promise to answer for the debt of another, and, not being in writing, was within the Statute of Frauds. Gen. Sts. c. 105, § 1, cl. 2; Stone *v.* Symmes;[2] Curtis *v.* Brown;[3] Furbish *v.* Goodnow; Browne on St. of Frauds, §§ 172–174.

Judgment on the verdict for the defendant.[4]

[1] The arguments of counsel are omitted. — ED.

[2] 18 Pick. 467.

[3] 5 Cush. 488.

[4] Morse *v.* Massachusetts Bank, Holmes C. C. 209, 214 (*semble*); Walton *v.* Mandeville, 56 Iowa, 597, *Accord.*

JOSEPH JARVIS *v.* ALLYN M. WILSON.

IN THE SUPREME COURT OF ERRORS, CONNECTICUT, MAY, 1878.

[*Reported in* 46 *Connecticut Reports*, 90.]

LOOMIS, J.[1] On the 8th of July, 1874, one William Murphy owed the plaintiff $189.20, and drew his order on the defendant in favor of the plaintiff in writing as follows: —

"Mr. A. M. Wilson. Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me.

"WILLIAM MURPHY."

Murphy, who was then and had been for some time in the employ of the defendant, had been authorized by the latter to draw orders in favor of his workmen, of whom the defendant knew the plaintiff to be one.

The above order was duly presented for acceptance to the defendant on the same day that it was given, and the defendant said it was good, and verbally promised to pay it. It afterwards appeared that there was in fact due from the defendant to the drawer only $144.94, and thereupon the defendant refused to pay the plaintiff as he had before agreed. The Court below upon these facts held the defendant liable for the full amount of the order. We think the judgment must stand against all the objections urged in behalf of the defendant.

The Statute of Frauds does not apply to such an undertaking. One reason may be that the acceptor is regarded as the primary debtor, and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

But in this case the defendant relies on the fact that when he accepted the bill he had not in his hands sufficient funds of the drawer to pay the amount required, and contends that the acceptance should therefore either be considered within the statute, or should be held void for want of consideration. This objection ignores the fundamental principle that the acceptance admits everything essential to the validity of the bill, and that want or failure of consideration cannot be shown in a suit by the payee against the acceptor. The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defence against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he

[1] Everything is omitted except the opinion of the Court relating to the Statute of Frauds. The Court decided that the instrument in question was a bill of exchange, and that an oral acceptance was valid. — ED.

owed the drawer that amount. This was exclusively within his knowledge; but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer sufficient to make good the acceptance. Fisher *v.* Beckwith;[1] Arnold *v.* Sprague;[2] United States *v.* Bank of Metropolis;[3] Grant *v.* Ellicott;[4] Hoffman *v.* Bank of Milwaukee;[5] Parsons on Notes and Bills, 323; 1 Daniels on Negotiable Instruments, 135.

There is no error in the judgment complained of.

In this opinion the other judges concurred.[6]

[1] 19 Vt. 31. [2] 34 Id. 402. [3] 15 Pet. 377.
[4] 7 Wend. 227. [5] 12 Wall. 181.

[6] Wynne *v.* Raikes, 5 East, 174; Laflin Co. *v.* Sinsheimer, 48 Md. 411 (in which cases the accommodation acceptance was in writing, but in an extrinsic document); Laflin *v.* Sinsheimer, 48 Md. 411; O'Donnell *v.* Smith, 2 E. D. Smith, 124 (in which cases the accommodation acceptance was written on the bill), *Accord.*

But see *contra* to the last two cases cited, Dunbar *v.* Smith, 66 Ala. 490.

An oral acceptance for value, it is everywhere agreed, is not affected by the section of the Statute of Frauds relating to guaranties. Shields *v.* Middleton, 2 Cranch, C. C. 205; Espalla *v.* Wilson, 86 Ala. 487; Nelson *v.* First Bank, 48 Ill. 36; Louisville Co. *v.* Coldwell, 98 Ind. 245; Spurgeon *v.* Swain (Indiana, C. A., 1895), 41 N. E. R. 397; McCutchen *v.* Rice, 56 Miss. 455; Lavell *v.* Frost (Montana, 1895), 40 Pac. R. 146; Leonard *v.* Mason, 1 Wend. 522; Spaulding *v.* Andrews, 48 Pa. 411; Dull *v.* Bricker, 76 Pa. 255; Strohecker *v.* Cohen, 1 Speers, 349 (*semble*); Neumann *v.* Shroeder, 71 Tex. 81; Fisher *v.* Beckwith, 19 Vt. 31; In re Goddard, 66 Vt. 415.

In jurisdictions where by statute the acceptance of a bill must be in writing, a drawer who, on presentment, promises the holder to pay the bill incurs no liability whatever. He is not liable as acceptor for want of a writing, nor as a simple contract promisor for want of a consideration for the promise. Anderson *v.* Jones, 102 Ala. 437; Pfaff *v.* Cummings, 67 Mich. 143; Overman *v.* Hoboken Bank, 30 N. J. 61; Weinhauer *v.* Morrison, 49 Hun, 498.

A recognizance is not within the Statute of Frauds relating to guaranties. Gay *v.* State, 7 Kas. 394.

AVAL OR ANOMALOUS INDORSEMENT. If one who is not the holder writes his name on the back of a bill or note, his true liability by the custom of merchants is that of an *aval*, and should not be affected by the Statute of Frauds, any more than the signature of any other party to a bill or note. But, unfortunately, the courts have not given effect to this custom, some treating such a party as a co-maker, others as a second indorser, and others as a guarantor. Where he is regarded as a co-maker or indorser, the Statute of Frauds is held to be inapplicable. Drake *v.* Markle, 21 Ind. 433; Kealing *v.* Van Sickle, 74 Ind. 529; Chaddock *v.* Vanness, 35 N. J. 517. Where he is regarded as a guarantor, the authorities are divided. The guaranty is not within the Statute of Frauds according to Beckwith *v.* Angell, 6 Conn. 315; Stowell *v.* Raymond, 83 Ill. 120; Peterson *v.* Russell (Minn., 1895), 64 N. W. R. 555. A contrary view was taken in Drake *v.* Markle, 21 Ind. 433 (*semble*); Culbertson *v.* Smith, 52 Md. 628; Hayden *v.* Weldon, 43 N. J. 128; Shafer *v.* Farmers, 59 Pa. 144; Hauber *v.* Patterson, 84 Pa. 274; Allwine *v.* Garberich, 2 Pears. 28; Temple *v.* Baker, 125 Pa. 634. — ED.

CHAPTER II.

SURETY'S DEFENCES AGAINST THE CREDITOR.

SECTION I.

Defences based on the Absence of any Liability of the Principal Debtor to the Creditor.

KIMBALL *v.* NEWELL.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1845.

[*Reported in* 7 *Hill*, 116.]

ON error from the Superior Court of the city of New York. Newell brought an action of covenant against Kimball in the marine court of the city of New York, claiming to recover certain rent due on a lease to one Theodosia Knowlton, for whom the defendant had become surety. On the trial, the plaintiff gave in evidence the following instruments:

"This is to certify that I have hired and taken from Daniel Newell the house in Nassau-street, &c., for one year, to commence on the first day of May next, at the yearly rent of four hundred and fifty dollars, payable quarterly. And I do hereby promise to make punctual payment of the rent, in manner aforesaid, and quit and surrender the premises, at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. Given under my hand and seal the 3d day of March, 1840. MRS. T. KNOWLTON. [L. S.]

"In consideration of the letting of the premises above described, and for the sum of one dollar, I hereby become surety for the punctual payment of the rent, and performance of the covenants, in the above written agreement mentioned, to be paid and performed by Mrs. Theodosia Knowlton, and if any default should be made therein, I do hereby promise and agree to pay unto the said Daniel Newell such sum or sums of money as will be sufficient to make up such deficiency, and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment, or proof of demand being made. Given under my hand and seal the 3d day of March, 1840.

"M. T. C. KIMBALL. [L. S.]"

It appeared that Mrs. Knowlton occupied under the lease, and that a balance of rent, amounting to $31.94, remained due the plaintiff. It further appeared that Mrs. Knowlton was a married woman at the time the lease was executed; and the defendant contended that, inasmuch as her covenant was void by reason of coverture, his was also void. The Marine Court held otherwise, however, and rendered judgment in favor of the plaintiff, which was afterwards affirmed by the Superior Court on *certiorari*, and the defendant brought error.

R. H. Shannon, for the plaintiff in error.

Howard & Onderdonk, for the defendant in error.

NELSON, C. J. The defendant having consented to become bound as surety for the rent of the premises leased to Mrs. Knowlton, it is but reasonable to presume that, if he was not well acquainted with her situation before, he then made some inquiries into her circumstances and condition, and thus became fully possessed of the facts which he now sets up as a ground of discharge.

But conceding that the defendant had no knowledge of the social condition of Mrs. Knowlton, and that he supposed she would be legally holden for the rent as it accrued, I am still of the opinion that he is liable on his contract. The doctrine for which his counsel contends is thus stated by Theobald: "The obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obligation necessarily induces the nullity of the accessory." Theob. Prin. & Sur. 2. This is undoubtedly correct as a general rule; but it has its exceptions, and the case before us is one of them.

Mr. Chitty says: "The rule that a party cannot be liable upon a contract of guaranty, unless the principal has incurred a legal responsibility, is true, in some instances, in form or words, rather than in substance." Chitty on Contr. 499. He adds: "In the case of a guaranty to answer for the price of goods to be supplied to a married woman, or goods (not necessaries) to be sold to an infant, or other persons incompetent to contract, no doubt the party guaranteeing, though professedly contracting only in the character of surety, would be responsible." Id. He refers to the case of Maggs *v.* Ames,[1] which was an action against the defendant as surety for a married woman. There the question was whether the undertaking of the defendant was an original one, so as not to require it to be in writing. The Court held that it was collateral, and therefore should have been in writing. But neither the counsel nor Court supposed that the defendant would not have been bound, if the contract had been in writing. On the contrary, that was assumed. In the case of White *v.* Cuyler,[2] it was impliedly at least conceded by Lord Kenyon, that a guarantor or surety for a *feme covert* would be liable on his contract. See also Chitty on Contr. 515; Pit-

[1] 4 Bing. 470.

[2] 6 T. R. 176.

man on Prin. & Surety, 13; Buckmyr v. Darnall; Harris v. Hunchback;[1] Chapin v. Lapham.[2]

The doctrine of the civil law is very clear and satisfactory on this subject. It is as follows: "Although the obligation of a surety be only an accessory to that of the principal debtor, yet he who has bound himself surety for a person who may get himself relieved from his obligation, such as a minor, or a prodigal who is interdicted, is not discharged from his suretyship by the restitution of the principal debtor: and the obligation subsists in his person; unless the restitution were grounded upon some fraud, or other vice which would have the effect to annul the right of the creditor." Dom. B. 3, tit. 4, § 1, art. 10, Strahan's ed. Again: "If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if it was a minor, who, in consideration of his being under age, got himself relieved from an engagement by which he suffered some prejudice, and that there had been no fraud on the creditor's part; the restitution of the minor would have indeed this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's obligation to the creditor. For it was only to make good the obligation of the minor, in case he should be relieved from it on account of his age, that the creditor took the additional security of a surety." Id., B. 3, tit. 4, § 5, art. 2; and see 1 Ev. Poth. On Obl. 237.

I am satisfied that the decision of the Court below was right, and that the judgment should be affirmed.

BEARDSLEY, J. I think the defendant was estopped from denying the competency of Mrs. Knowlton to bind herself by the covenant she assumed to execute. The defendant by his covenant admits she was thus bound, and he shall not be allowed to gainsay it by alleging her incapacity to make a legal contract. Had she been induced to enter into this engagement by fraud or imposition, or upon a usurious consideration, the case might have been otherwise; but the defendant, although a surety, cannot be permitted, on the ground now set up, to deny the legal existence of a covenant which is explicitly conceded by his own deed. Co. Litt. 352 *a*, note 306; 1 Stark. Ev. 302, Am. ed. of 1830; Greenl. Ev. §§ 22 to 26, and the notes.

The judgment of the Court below is right, and should be affirmed.

Judgment affirmed.[3]

[1] 1 Burr. 373.

[2] 20 Pick. 467.

[3] Nabb v. Kountz, 17 Md. 283; Weare v. Sawyer, 44 N. H. 198, 205 (*semble*), *Accord*. If a joint covenant, or promissory note, is given by a married woman as principal and another as surety, the coverture of the principal, although a defence to her, is no defence to the surety. Stillwell v. Bertrand, 22 Ark. 375; Davis v. Statts, 43 Ind. 103; Jones v. Crosthwaite, 17 Iowa, 393; Allen v. Barryhill, 27 Iowa, 534, 539; Adams v Curry, 15 La. An. 485; Yale v. Wheelock, 109 Mass. 502; Winn v. Sanford, 145 Mass. 302, 148 Mass. 39; Browning v. Carson, 163 Mass. 261; Whitworth v. Carter, 43 Miss. 61: Foxworth v. Bullock, 44 Miss. 457; Wild Co. v. Maxwell, 63 Mo. 486; Lobaugh

Turnbull v Newell

Π leased premises to one Mrs K., and Δ signed as surety for performance of her covenants. Π sues for rent, & Δ claims that since woman's contract was void because of coverture, he could not be held. Δ knew of the fact of marriage. ct gave judgment for Π. Usually an obligation of principal is necessary, but this is an exception here. One judge went on ground of estoppel.

L. D. BAKER, Respondent, v. P. G. KENNETT, Appellant.

In the Supreme Court, Missouri, October Term, 1873.

[*Reported in* 54 *Missouri Reports*, 82.]

Wagner, Judge, delivered the opinion of the Court.[1]

This was an action on a promissory note executed by the defendant on the 1st day of May, 1872, in favor of the plaintiff for the sum of eight thousand dollars.

The record discloses these facts: That at the time the note was made and executed, the plaintiff was the owner of a tract of land in Jefferson County, and that the defendant, Press. G. Kennett, then a minor under the age of twenty-one, was desirous of purchasing the same. The parties finally came to an agreement, and the price was fixed at eight thousand dollars, plaintiff making to the defendant, Kennett, a deed for premises, and he executing the note sued on, due and payable seven months after date, with ten per cent interest from the date thereof, with his mother and sister signing the note as his sureties. The evidence clearly shows that the land was not worth the sum agreed to be paid for it. Kennett took possession of the same, making considerable improvements thereon, and on the 15th day of Sept. 1872, whilst he was still an infant, he went to the plaintiff and demanded back his note, offering to re-convey the land, and pay the interest due on the note. Shortly after his majority, he offered to pay two thousand dollars, and re-convey the property to plaintiff, and give him the improvements that he had put upon the premises, but this offer was refused.

On Nov. 10th, 1872, Kennett attained his majority, and he abandoned the premises, leaving a man there to take care of them, saying that there would be a lawsuit about them, and that the tenant should keep them for whoever became ultimately entitled to them.[2]

But it is contended, that although the infant may not be bound, the sureties are nevertheless liable.

As a general proposition it is undoubtedly correct, that infancy does not protect the indorsers or sureties of an infant, or those who have

v. Thompson, 74 Mo. 600; Weare *v.* Sawyer, 44 N. H. 198, 205; Wagoner *v.* Watts, 44 N. J. 126; Erwin *v.* Down, 15 N. Y. 576; Davis *v.* Commissioners, 72 N. Ca. 441, 444, 74 N. Ca. 374, 375; Shallcross *v.* Smith, 81 Pa. 132; Wiggin's App. 100 Pa. 155; Smyley *v.* Head, 2 Rich. 590; Hicks *v.* Randolph, 3 Baxt. 352; St. Albans Bank *v.* Dillon, 30 Vt. 122.

In a few of the cases just cited the coverture was known to the surety co-promisor, but in the majority of them the report discloses nothing as to the surety's knowledge. — Ed.

[1] Everything is omitted except the opinion of the Court relating to suretyship. — Ed.

[2] The Court decided that Kennett, having effectually disaffirmed the contract, was not liable. — Ed.

jointly entered into his voidable undertakings.[1] But the cases in which this principle has been decided are clearly distinguishable from the present one. Here the undertaking of the sureties goes to the whole consideration.

Story says, "that a subsequent failure of consideration is equally fatal with an original want of consideration, and if a bill is given as an indemnity, it is a sufficient answer to it that the party has not been damnified at all, or that the original claim has been extinguished." Story, Bills, § 184.

By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished.

It would be a strange doctrine which would give him back his land, and allow him to recover from the sureties the purchase-money also.

The rule quoted does not apply to this case. The plaintiff contracted with an infant, knowing him to be an infant at the time, and after a rescission of the contract he obtains back again what he sold. This the law gives him, but it does not give him the property and the consideration both.[2]

My opinion is that the judgment should be reversed. The other judges concur, except JUDGE NAPTON, who did not sit.

D. N. LEE *v.* J. N. YANDELL.

IN THE SUPREME COURT, NOVEMBER 1, 1887.

[*Reported in* 69 *Texas Reports*, 34.]

THIS suit was brought by appellant against Yandell, appellee, and W. A. Gray and A. M. Waldrup, on a promissory note, joint and several upon its face, but which it was alleged in the answer that Gray and Waldrup signed as sureties. The answer alleged that Yandell was *non compos mentis* when the note was made, and that there was no consideration therefor.[3]

MALTBIE, J. The third charge is as follows: "If you find from the evidence that the defendant Yandell, at the time he signed the note sued on, was of unsound mind to such an extent as to be unable to comprehend the nature, meaning, and effect of his act in signing such note, you will return a verdict for defendants."

This was also assigned as error; and, being the only instruction given in reference to Yandell's sanity, it should be considered in the light of all the facts proven on the trial in reference to that subject.

[1] Dexter *v.* Blanchard, *supra*, 26, 27, n. 2; Parker *v.* Baker, Clarke, ch. 136; Kuns *v.* Young, 34 Pa. 60, *Accord.* — ED.

[2] Patterson *v.* Cave, 61 Mo. 439, *Accord.*

See also Parker *v.* Baker, Clarke, ch. 136. — ED.

[3] A portion of the case, not relating to suretyship, is omitted. — ED.

Baker v Kennett

Π sold land to an infant, taking his note, signed by mother as surety. Infant then disaffirmed & abandoned land, & Π sues surety on note & at jury judgment for Δ. Original claim has been extinguished, & Π can't get land & wrongs both with an contract was rescinded, Δ's liability ended.

Lee v Yandell et al

Suit on note signed by D + two others which was joint + several. Ct charged that if D was insane at making the other two sureties would not be liable, verdict for D, Suit dismissed thus. The case is not kept from that of an infant or married woman, it could not be held that contract was made with reference to insanity of principal.

While it must be regarded as an imperfect presentation of the law of the case, as a general proposition it cannot be said to be incorrect; and the plaintiff not having called the attention of the Court to other phases of the question by asking appropriate instructions, ordinarily there would not be error in the omission. Farquhar *v.* Dallas;[1] Gallagher *v.* Bowie.[2] In this case, however, two other persons signed said note as sureties as well as the principal, Yandell.

As a general proposition, whenever a principal on a note is discharged, his sureties will be also; but to this rule there are certain well-established exceptions. For instance, the note of a married woman, without the payee having been guilty of fraud or deceit in procuring the signature of such married woman, the sureties would be liable though the principal be discharged. 2 Daniel on Neg. Inst., par. 1306 *a*; Davis *v.* Staaps;[3] Allen *v.* Berryhill;[4] Hicks *v.* Randolph.[5]

The same principle has been extended to sureties on notes executed by infants; and it is believed that no valid reason can be given why sureties of a person of unsound mind should not be held liable under like circumstances, though the principal be discharged, especially so, when the payee of the note is ignorant of the fact that the principal is a lunatic; as in such case a recovery might be had even against the lunatic, if the payee acted in good faith. Pomeroy's Equity.[6] The contract of a surety is, that if the principal does not pay, he will, and sound policy as well as the plainest principles of justice demand, that when there is a valid consideration, and the payee has done nothing to deceive or mislead either principal or surety, and the principal is held to be not liable, on account of some disability existing at the time of the making of the contract, whether such disability be coverture, infancy, or unsoundness of mind, the surety should be held to the terms of his contract. The reason given in some of the cases why the surety of a married woman is held, is that the payee and the surety knew at the time that the contract was made that the married woman might refuse to pay, or that the contract was made in reference thereto, the surety binding himself to pay in case she should avail herself of her legal rights. In case of a lunatic it might be presumed that if the payee knew of the disability, the sureties, being his close friends, would also know of it, and that the contract was made in reference to that state of facts. There was no evidence that Lee had in any manner deceived, overreached, or defrauded Yandell in procuring him to sign the note. Hence we are of opinion that the charge of the Court should have been limited to Yandell, and the question submitted as to the liabilities of the sureties on the principles herein enunciated.

Reversed and remanded.[7]

[1] 20 Texas, 200. [2] 66 Texas, 265. [3] 43 Ind. 103.
[4] 27 Iowa, 531. [5] 3 Baxter, 352. [6] Vol. 2, p. 946.
[7] In Grove *v.* Johnstone, L. R. 24 Ir. 352, a bond was given by a principal and sureties conditioned upon the due collection of all sums of money which the principal, as

ARTHUR W. RUSSELL *v.* JOHN F. ANNABLE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1870.

[*Reported in* 109 *Massachusetts Reports*, 72.]

CONTRACT, brought August 3, 1870, against one of the sureties in a joint and several bond given under the Gen. Sts. c. 123, § 104, to dissolve an attachment.

AMES, J.[1] It is well settled that one partner cannot bind his associates by affixing his signature, in the name and style of the firm, to an instrument under seal.[2] To make such a transaction binding, it must appear that there was either a previous authority, or a subsequent ratification on the part of the other partners, adopting the signature as binding upon them. Cady *v.* Shepherd;[3] Van Deusen *v.* Blum;[4] Swan *v.* Stedman;[5] Dillon *v.* Brown.[6] The report in this case presents no evidence of any previous authority or subsequent ratification, and it follows that the bond is not so executed as to bind the members of the firm.

The bond purports to be the joint and several contract of certain persons named therein as principals, and the defendant and George M. Stevens as sureties. The defendant's undertaking is only that the principal obligors shall fulfil the obligation which by the terms of the bond they have assumed. But if the bond was not binding upon both Dennett and Pottle (as it was not, for want of due and proper execution of the instrument on their part), they assumed no obligation, and it was not binding upon the sureties. It was essential to the bond that the principals should be parties to it; it is recited that they are so, and the instrument is incomplete and void without their signature. The remedy of sureties against their principals might be greatly embarrassed if such an instrument as this should be held binding. There is nothing to estop any member of the firm who did not sign it, from denying that he was a party to it, and it was no part of the defendant's contract that he should be surety for one member of the firm, and not for both. The instrument is incomplete without the signature of each partner, or proof that the signature affixed had the assent and sanction of each of them. The sureties on a bond are not holden if the instru-

collector, should be required to collect under certain warrants. Soon after the execution of the bond and before any default the principal became and continued to be a lunatic. His lunacy, it was held, exonerated him and also the sureties from all liability upon the bond. — ED.

[1] Only the opinion of the Court and a part of the dissenting opinion are given. — ED.

[2] The signatures to the bond were in the following form: —

"Signed, sealed, and delivered in presence of
Edward Raymond.

Dennett & Pottle, [seal]
George M. Stevens,
John F. Annable." — ED.

[3] 11 Pick. 400.

[4] 18 Pick. 229.

[5] 4 Met. 548.

[6] 11 Gray, 179.

ment is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties. Bean v. Parker;[1] Wood v. Washburn.[2]

The instrument, being found incapable of taking effect as a specialty, cannot operate as a simple contract. Cases have indeed arisen, in which a bond, duly executed, expressing a contract which the parties had a right to make, has been held to be valid at common law, although not made with the formalities, or executed in the mode, provided by a statute under which it purports to have been given. See Sweetser v. Hay[3] and cases there cited. But we find no case in which it has been held that a written instrument, purporting to be a specialty, and plainly intended by the parties to have all the incidents and characteristics of a bond in the strict and technical sense of that word, has ever been transmuted by the Court into a simple contract, for the reason that it has not been properly executed to take effect as a contract under seal.

It is therefore held, by a majority of the Court, that there should be judgment for the defendant.

WELLS, J., dissenting. This suit is against the surety alone. Execution of the bond by him is admitted. There is a principal obligor legally bound; because upon the face of the bond, and the statements of the report, the partner who signed the bond is bound thereby. Van Deusen v. Blum;[4] Dillon v. Brown.[5] It does not appear, and is not alleged in the answer, that the defendant was misled in regard to the execution by the principal; or that he had any reason to suppose that the instrument was to be executed otherwise than as stated in the report, and as appears on its face; or that it was not understood and intended by the defendant that it should be delivered in the form in which it now appears. It may fairly be presumed that the signatures were attached in the order in which they stand upon the paper. If so, the defendant knew that the signature of the principals was written by one of them only. If he signed it, or consented to its delivery, with knowledge of the mode in which it was executed in behalf of the principals, he is bound by it. A party to a sealed instrument may be held bound by it, notwithstanding the fact that some of the persons who are, by the form of the instrument, parties to it, have not executed it. Cutter v. Whittemore;[6] Adams v. Bean;[7] Herrick v. Johnson;[8] Kendall v. Karland.[9] The case of Adams v. Bean is especially in point.

Even if it should be held that the burden is upon the plaintiff to show that the defendant delivered or consented to the delivery of the bond under such circumstances as to bind him, notwithstanding its invalidity to bind both partners, yet this aspect of the case does not appear to have been presented in the court below, or to have been considered in drawing up the report. The point presented arises upon the objection "that there was no legal execution of it by the principals, and there-

[1] 17 Mass. 591. [2] 2 Pick. 24. [3] 2 Gray, 49.
[4] 18 Pick. 229. [5] 11 Gray, 179. [6] 10 Mass. 442.
[7] 12 Mass. 137. [8] 11 Met. 26. [9] 5 Cush. 74.

fore it was void as to the defendant." This objection is sustained only by the fact stated, that it was executed in the partnership name by one of them only. As the legal result contended for does not follow conclusively from the facts stated in the report, but depends upon other facts not alleged and apparently not considered, it seems to me that the proper order in the case would be, that the report be discharged, and the case stand for trial upon the facts. The plaintiff's claim is a meritorious one, and he ought not to be defeated of his remedy upon any mere technicality. If, in fact, the defendant consented to the delivery of this bond knowing that it was signed by one of the principals without authority from the other, it seems to me that it would be allowing a technicality to prevail over substantial justice to permit this defence to succeed without further opportunity to prove the facts. I do not think the report requires that we should hold the plaintiff thus strictly. *Judgment for the defendant.*[1]

P. C. JONES AND ANOTHER v. B. W. THAYER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1859.

[*Reported in* 12 *Gray*, 443.]

ACTION of contract upon this guaranty, signed by the defendant: "For value received I hereby guarantee to Messrs. Jones & Wheelwright the prompt payment of W. W. Messer's note dated March 20th, 1852, and payable in eight months from date for five hundred and seventy and $\frac{65}{100}$ dollars." The case was submitted to the decision of the court upon the following facts: —

The plaintiffs received from Messer, in payment for merchandise, a promissory note, corresponding to the description in the guaranty, payable to his own order, but not indorsed. The defendant, at the time of signing the guaranty, was shown this note, and was paid a commission for his guaranty. Neither party then knew that the note was not indorsed. In May, 1852, Messer went to California, and has never

[1] Stewart v. Behm, 2 Watts, 356, would seem to support the dissenting opinion of WELLS, J. But the facts are meagrely reported. The Court say: "Where the obligee has acted with good faith, what has he to do with the mistakes or misconceptions of the obligor? Here the principal obligor signed the name of his firm; and the point of defence is rested on an assumption of the fact that the surety supposed the signature would bind both the parties. But his mistake was in a matter of law which he was bound to know; and even had it been in a matter of fact, which was the basis of his motive for becoming bound, it would not avail him, unless it were induced by the misrepresentation of the obligee. Here it seems the obligee was not present at the act of execution; and as there is no pretence of misrepresentation or concealment by him at any time, there was no color for the defence." See also Weare v. Sawyer, 44 N. H. 198, 205; Dickerman v. Bowman, 14 Wis. 388. — ED.

Partnership Principals

Bond was signed + sealed in partnership name by one partner with no authority, + D was one of the sureties. This was action of contract upon the bond, + D contended that since principle was not bound, he was not, + et gave judgment for D. No principal was bound here, since it was not sealed by the intended principal. Hence surety is not bound.

dissenting opinion held that the partner who actually signed was liable, + her - there was a principal obligation, + that D is so bound by P's knowledge of way it was signed.

Ames v Thayer

One Messer gave π his note in payt of goods, π got Δ to guarantee it, paying him consideration therefor, Later on found it turned out that it was to his order, & was not indorsed, & Δ then refused to pay. π sues. Ct gave judgment for π. Δ saw note when he guaranteed its payt, & it was a guarantee of the particular instrument then held, & Δ must be bound by his construction of instrument then.

since resided in Massachusetts. His note was left at a bank in Boston for collection, and the usual demand and protest for non-payment were made, and notice thereof given to the defendant, who, on going to the bank, for the first time found out that the note was not indorsed, and refused to pay it.

J. W. May, for the plaintiffs.

C. A. Welch, for the defendant.

This case was decided in February, 1860.

DEWEY, J. The defendant resists the claim of the plaintiffs upon this guaranty, on the ground that he guaranteed Messer's note for $570.65, and the plaintiffs held no note against Messer. Upon the production of the instrument signed by Messer, it appears to have been in form a promissory writing by which Messer promised to pay to his own order the sum above named, and the paper in this form was delivered to the plaintiffs in payment of certain articles of merchandise, without the indorsement of Messer on the back thereof. It is then said that such a promise to pay to one's own order requires an indorsement by the maker to give it legal effect as a note payable to a third person. This is so, and had the question arisen upon a promise made prospectively to guarantee a note of Messer made payable to the plaintiffs, the guarantor might well object that the note produced did not correspond with the instrument that he stipulated to guarantee.

But the case before us is presented under a different aspect. The guaranty was not in reference to a note to be made, or a note executed by Messer not seen by the guarantor, but to an instrument presented to the defendant as the basis of the negotiation, and as the particular paper containing the promise to be guaranteed, and for which guaranty a valuable consideration was paid by the plaintiffs to the defendant. Under these circumstances, it must be taken to be a guaranty of the particular instrument which the plaintiffs then held, and which was exhibited to the defendant. Both parties were equally ignorant of the fact that the name of Messer was not indorsed upon the note. The paper shown to the defendant is now in the same state in which it then was, and all the rights that could attach from the relation of the parties thereto as holder or as guarantor do now exist as they were then disclosed. If the instrument be less available to the guarantor in case he is required to pay the same than he supposed it to be, that was an error of his own for which he must be responsible. The defendant, having, upon the presentation of this instrument by the other party, treated it as a note, and having taken his commission for guaranteeing it as such, must be bound by it, so far as concerns this objection.

The case of Veazie *v.* Willis,[1] was in many of its features like this. There, as here, the real state of the note was misunderstood by both parties to the guaranty. The names of the maker and one of the indorsers were forgeries, but that fact was unknown to the parties

[1] 6 Gray, 90.

when the guaranty was procured. In that case the defect was not one apparent upon the paper, as the present was, and to that extent it was a stronger case for the defendant.

Whether the putting into circulation of this paper by the maker, Messer, by delivery to a third party in payment for merchandise, although without his indorsement, would give it the effect of a note payable to bearer, and which as such might be enforced by a holder for value, we have not found it necessary to decide.

There is nothing in the case to sustain any valid defence by reason of a want of demand and notice of non-payment of the note by Messer. *Judgment for the plaintiffs.*

YORKSHIRE RAILWAY WAGON CO. *v.* MACLURE.

IN CHANCERY, BEFORE KAY, J., DECEMBER 7, 8, 15, 20, 1881.

[*Reported in Law Reports*, 19 *Chancery Division*, 478.]

THE Cornwall Minerals Railway Company were in want of money, and their borrowing powers under their act were nearly exhausted. In the month of June, 1876, negotiations took place between them and the Yorkshire Railway Wagon Company for an advance of £30,000 to the Railway Company. The Railway Company were advised that they could not give a valid security for the proposed advance as a loan, but that the agreements next mentioned were within their powers. Accordingly an agreement under seal was made between the companies, dated the 20th of June, 1876, by which it was agreed that the Wagon Company should let, and the Railway Company should hire, for the term of five years, fifteen locomotive engines (therein stated to belong to the Wagon Company, and to bear their name-plates), at the yearly rent of £4,428. The Railway Company was bound to keep the engines in repair, and if default was made in any of the payments the Wagon Company might seize and take away the engines: on the due completion of the agreement the Railway Company were to have the option of purchasing the engines at £1 each. On the same 20th day of June, 1876, three of the directors of the Railway Company — John W. Maclure, J. Nield, and A. O. Sherriff — signed a guaranty as follows, appended to the agreement: —

"To the Yorkshire Railway Wagon Company, Limited. — In consideration of your letting the above-mentioned engines to the Cornwall Minerals Railway Company, on the terms above-mentioned, at our request, we, the undersigned, hereby jointly and severally guarantee the due payment to you by the said Cornwall Minerals Railway Company of all rent payable by them in pursuance of the above-written

agreement up to and including that payable on the 1st day of January, 1879. And we also jointly and severally guarantee the observance and performance by the said Cornwall Minerals Railway Company up to the said 1st day of January, 1879, of all the stipulations on their part contained in the above-written agreement."

A similar agreement and a similar guaranty were made as to two hundred railway wagons, the rent for them being £2,952. The engines and wagons had been part of the rolling stock of the Railway Company, and it was alleged and not denied that a formal delivery of them to the Wagon Company had been made, but no bill of sale had been executed, and they continued to be used by the Railway Company. It was admitted at the bar that the £30,000 had been received, and had been applied by the Railway Company in payment of debts owing by them.

In 1879 the Wagon Company brought an action against John W. Maclure, one of the directors who signed the guaranty, and the executor of A. O. Sherriff (the third, J. Nield, being dead insolvent), and by amendment against the Railway Company alleging, as appeared to be the fact, that the rents for the engines and wagons had not been paid; and that the Railway Company had sold them to the Great Western Railway Company; and claiming damages for breach of the guaranties, and payment of the rent and interest thereon.

Maclure, by his statement of defence, pleaded that the sale of the engines and wagons was nominal, and made in order to disguise the fact that the transaction was a loan; that the borrowing the money was *ultra vires* and illegal, and that the Wagon Company had no right of action; also that the Wagon Company had been negligent in not pressing for payment from J. Nield and from the Railway Company.

J. Virtue, the executor of A. O. Sherriff, made a similar defence, except as to giving time.

The Railway Company (who had been made parties by amendment) made a similar defence, except as to the default of the Wagon Company in not pressing the Railway Company for payment.

Romer, Q. C., and *Bunting*, for the Wagon Company.

Fischer, Q. C., and *Cope*, for the Railway Company.

Higgins, Q. C., and *Prior*, for Maclure.

KAY, J.[1] There remains the case against the chairman, Mr. Maclure, and the other directors who signed the guaranties. Mr. Maclure pleads that the agreements were made under the following circumstances: —

The fifteen engines and two hundred wagons were, at the time such agreements were made, in fact the property of the Cornwall Minerals Railway Company. That company, being desirous of borrowing

[1] The arguments are omitted, together with so much of the opinion as relates to the liability of the Railway Company. The learned judge decided that the transaction was a mortgage of the rolling stock to secure a loan of £30,000, and was invalid because beyond the powers of the company. — ED.

a sum of money, and having no available borrowing powers under their acts, as the plaintiff company were at that time fully aware, agreed with the plaintiff company that the loan should be made to the Railway Company by the plaintiff company of the sum of £30,000, and that by way of repayment by instalments of the principal sum borrowed, and payment of interest thereon, the Railway Company should pay to the plaintiff company certain fixed quarterly sums for the period of five years; and to disguise the fact that such transaction was a loan, and that such payments were for such principal and interest, and to give a color to the transaction, it was further agreed that there should be a nominal sale by the Railway Company to the plaintiff company of the engines and wagons; and that formal agreement should be made as if there were a loan with an option to purchase at a nominal sum. Such borrowing was *ultra vires* the Railway Company, and illegal, as the plaintiff company well knew at the time of their making the loan.

Mr. Maclure was chairman of the company throughout this transaction, and his defence, to say the least of it, is startling. It is not less so because the solicitors of the company, who seem to have advised the directors that the transaction was legal and right, as appears by the minute of the 6th of April, 1876, are the solicitors on the record for Mr. Maclure in this action. It was argued by his counsel that, looking to the effect on the debenture holders, the transaction was *malum in se*, and language was used which seemed to me at the time not only strange on his behalf, but utterly unwarranted by the facts of the case. I see no reason for believing that the directors did anything *malum in se*. They conceived they had hit upon a lawful mode of evading the Acts of Parliament, and seem to have been so advised, but the real question is whether there was not consideration for their guaranty. In the German Mining Company's case[1] the money was paid by the guarantors after the first decision, as appears at p. 43 of the report, no doubt being suggested as to their liability to pay it. In Chambers *v.* Manchester and Milford Railway Company[2] Lord Blackburn says this: "The plaintiff had become security for a loan to the company by signing a joint promissory note. When the note became due, the bank had a right to come upon him and the co-surety, but he could not have sued the company for money paid to their use; he paid it to discharge a loan which was not contracted by the company in compliance with the restrictions imposed by their act." Lord Blackburn there does not doubt the right of the lender to recover against the sureties, although the loan was to a railway company which could not borrow. Probably the very reason in this case for requiring the guaranty was the doubt that existed whether the company could be compelled to repay the money. I asked for authority upon this point, but none was cited. I therefore must decide that the directors are liable upon their guaranties.

[1] 4 D. M. & G. 19.

[2] 5 B. & S. 588, 612.

Yorkshire Ry Wagon Co v Viva Clare

A Ry Co needed money & had no power to borrow, so by advice of solicitors they executed deed of hire whereby Ry Co π would loan money to Ry Co, & Ry Co was to pay to π quarterly instalments, & a color was put to transaction by a subhired sale x & held the borrowing illegal x at time of loan, Δ's signed a guaranty of the debt & rent due, x Δ pleaded that borrowing was ultra vires & since P was not bound he was not bound

et gave judgment for π x P notably x as to subhired there was doubt as to it to borrow, & guaranty was taken to secure π x

Swift v Beers

note given to T by a state BK, guaranteed by D. Under laws of state all note on time or interest issued by state were invalid & void. Ct held that D could not be held on this note, being within the act, since it was intended to secure the note.

Upon the whole case, I hold that the transaction was a borrowing by the railway company, and an attempt to give a security for the loan on the rolling stock, and that this, so far as the company was concerned, was *ultra vires* and void. I must therefore dismiss the action against the company. I must declare that the sureties are liable for the unpaid instalments of the loan which are covered by their guaranties; I must order payment by Maclure, and, if required, there must be an administration order against the estate of Sherriff. The plaintiffs must pay the Railway Company's costs, and Maclure, and Sherriff's executors must pay the plaintiffs' costs against them.[1]

SWIFT AND OTHERS v. BEERS.

IN THE SUPREME COURT, NEW YORK, MAY, 1846.

[*Reported in* 3 *Denio*, 70.]

ASSUMPSIT tried at the New York Circuit in February, 1844, before KENT, late C. Judge. The plaintiffs gave in evidence a promissory note with a guaranty written under it, signed by the defendant, in the following words: —

"NEW YORK, 30th June, 1841.

"Sixty days after date the North American Trust and Banking Co. promise to pay to the order of Messrs. Swift & Co. thirty-seven hundred dollars, for value received, with interest, having deposited with them as collateral security seven bonds of this company, secured under the Yates trust — three for one thousand dollars [giving the amounts and numbers of the bonds].

"THOMAS G. TALMAGE, Pres't.

"For value received, I guarantee the payment of the above note at the time mentioned. J. D. BEERS."

It was admitted that the North American Trust and Banking Company was a banking association, organized under the general banking law.

The defendant's counsel moved for a nonsuit, insisting that the note and guaranty were illegal and void: and the circuit judge, being of that opinion, directed a nonsuit to be entered.

D. Graham, Jr., for the plaintiffs, now moved to set aside the nonsuit, and for a new trial. He denied that by the true construction of the 4th section of the Act of May 14, 1840, amendatory of the general banking law (Stat. 1840, p. 306), all notes on time or on interest,

[1] Chambers *v.* Manchester Co., 5 B. & S. 588, 612; Weare *v.* Sawyer, 44 N. H. 198; Davis *v.* Commissioners, 72 N. Ca. 44, 74 N. Ca. 374; Mason *v.* Nichols, 22 Wis 376, *Accord*. — ED.

were forbidden to be issued by the banking associations — but only such as were intended to be issued or put into circulation as money. He referred to Stat. 1838, p. 246, § 3; Safford *v.* Wyckoff;[1] Smith *v.* Strong;[2] and Safford *v.* Wyckoff.[3] He also insisted that if the note were void, the guaranty was valid; and that a recovery could be had against the defendant either as a sole or a joint maker; and cited 17 Wend. 40; 19 John. 60; 1 Hill, 256; 4 Id. 420; 19 Wend. 202; 17 Id. 214.

S. Sherwood, for the defendant.

By the Court, BRONSON, C. J. We have no doubt about this case. The note is directly within the terms of the prohibition of the Act of 1840; and we do not doubt but that it was equally within the intention of the legislature. That act has no reference to the circulation of such notes as money, but was designed to prohibit them altogether for any purpose.

The guaranty partakes of the character of the principal contract. It was intended to reinforce and secure it — and is equally illegal. The circuit judge was right in nonsuiting the plaintiffs.

New trial denied.[4]

PUTNAM, EXECUTOR, RESPONDENT, *v.* SCHUYLER, APPELLANT.

IN THE SUPREME COURT, NEW YORK, APRIL TERM, 1875.

[*Reported in* 4 *Hun*, 166.]

LEARNED, P. J.[5] Mrs. Henriques, in her lifetime, made two notes to Dr. Allen, the plaintiff's testator. After her death the defendant guaranteed them, by writing under each, as follows: —

"For value received I hereby guarantee the payment of the above note. L. W. SCHUYLER."

On the trial the defendant offered to prove that Dr. Allen was the medical attendant of Mrs. Henriques; was in the habit of advising her as to financial and other matters; that she reposed confidence in him in relation to her affairs; together with certain other matters tending to show that the notes were obtained by fraud, and that they were

[1] 1 Hill, 11. [2] 2 Id. 241. [3] 4 Id. 442.

[4] Miller *v.* Gaskins, Sm. & M. Ch. 524 (*semble*); Russell *v.* Failer, 1 Oh. St. 327 (usury); Morse *v.* Hovey, 9 Paige, 197; Parshall *v.* Lamoreaux, 37 Barb. 189, *Accord.*

If a statutory bond is taken under such circumstances or in such a form as not to be binding upon the principal obligor, the illegality will be a defence to any action against the surety obligor. U. S. *v.* Tingay, 5 Pet. 115; Hawes *v.* Marchant, 1 Curt. 136; State *v.* Brantly, 27 Ala. 44; Ferry *v.* Burchard, 21 Conn. 597; Jones *v.* Turner, 5 Litt. 147; Thompson *v.* Buckhannon, 2 J. J. Marsh. 416, 419; Fisher *v.* Shattuck, 17 Pick. 252; Crum *v.* Wilson, 61 Miss. 233; Thompson *v.* Lockwood, 15 Johns. 256. — ED.

[5] Only the opinion of the Court is given.

without consideration. The evidence was objected to on the ground that, by executing the guaranty, the defendant had admitted the notes, and was estopped; that the defence of fraud was personal to Mrs. Henriques and her representatives; that the defendant could not impeach the settlement between maker and payee. The evidence was excluded, and the defendant excepted.

I assume, from the manner in which the case is presented, that it was not really claimed on the trial that these matters would not have been competent in behalf of the representatives of Mrs. Henriques. Their exclusion was on the ground that they were not competent in behalf of the guarantor. On this subject, of the right of a guarantor to set up defences which would undoubtedly be valid in favor of the principal, there is an apparent conflict. But a little discrimination will show that the conflict is only apparent.

First. There is a class of cases in which the owner of a note or bond has assigned it, with a guaranty. In these, it has been held that the guarantor could not show that the instrument was invalid. It would be unjust to permit him to assign an invalid instrument; to guarantee its payment or collection; to receive the value, and then, when sued on his guaranty, to assert that the original instrument was invalid. He is estopped.[1] The case of Mann *v.* Eckford's Executors[2] is of this character. The Life and Fire Company of which Eckford was president, assigned to the Western Insurance Company a bond and mortgage. Eckford guaranteed the bond and mortgage, and the money paid for it, *expressing the amount.* The defendants, his executors, were not allowed to set up usury in the bond and mortgage, against the plaintiff, the receiver of the Insurance Company.

Second. The guarantor is held liable in those cases in which the debt is justly owing, although, from some defect or incapacity, the principal is not liable in an action. Thus, where the makers of a note were married women, incapable (then) of making a note, the accommodation indorser was still held liable.[3] The guarantor of a lease is liable, although only one of the two lessees executed the lease.[4] In that case Judge Bacon speaks of this class of cases, mentioning, among others, the guaranty of goods sold to an infant. So the guarantor of a note purporting to be made by two, where the signature of one is unauthorized, is liable.[5] In all these cases the debt is justly owing to the plaintiff; and through no fault of his, he is unable to recover against the principal, or one of the principals.

Third. A guarantor cannot set up, by way of set-off, a claim distinct from that on which he is sued. The right of set-off (that is, as distin-

[1] Remsen *v.* Graves, 41 N. Y. 475; Zabriskie *v.* C. C. and C. R. R. Co., 23 How (U. S.) 399.

[2] 15 Wend. 502.

[3] Erwin *v.* Downs, 15 N. Y. 576; see Kimball *v.* Newell, 7 Hill, 116.

[4] McLaughlin *v.* McGovern, 34 Barb. 208.

[5] Sterns *v.* Marks, 35 Barb. 565.

guished from a defence arising upon the claim itself) belongs only to the principal debtor, and can be used only at his option. Such is the doctrine of Gillespie *v.* Torrance,[1] and this is all which that case decides on this point. By indirection, however, it implies that a defence to the claim (as distinguished from a set-off), is available to the guarantor. To the same effect is Lewis *v.* McMillen.[2]

Fourth. But there are still other cases which are not embraced within either of these three preceding classes: cases where the plaintiff is the original party to the contract, and therefore has not received it by assignment from the guarantor; where the proposed defence is not the incompetency of the principal to contract; and where it arises out of the contract itself, and not by way of set-off. In these the guarantor has been permitted to make the defence.

He has thus, as to the original contract, been allowed to set up usury,[3] duress of his principal,[4] partial failure of consideration.[5] And I find no case which intimates that when a person has obtained an obligation from a principal by fraud, he can wipe out the fraud by obtaining a surety to the obligation. Assuming that, in justice and equity, the obligee, by reason of fraudulent acts on his part, has either no claim, or a less claim, against the principal, I see no reason why he should stand in a better position against the guarantor.

The distinction which has been pointed out, viz., that inability on the part of the principal to contract is no defence to the guarantor, while fraud in the contract is, may be found in the civil law. This says that personal defences do not pass to others, but that defences *inherent in the thing*, such as, among others, fraud and duress, are available to sureties.[6] "If, in the principal obligation, there is any essential vice which may annul it, as if it has been contracted by force, if it is contrary to law, or to good manners, *if it be founded only on a fraud*, or on some error which may suffice to annul it: in all these cases the obligation of the surety is likewise annulled."[7]

The defendant offered to prove acts of the plaintiff's testator tending to show that he obtained the notes improperly from the maker; that he took advantage of her confidence in him, and that she did not owe him. If these facts be true, he ought neither to recover of her representatives on the notes, nor of the defendant on her guaranties.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

Present — LEARNED, P. J., BOARDMAN and JAMES, JJ.

Judgment reversed, and new trial ordered, costs to abide event.[8]

[1] 25 N. Y. 306. [2] 41 Barb. 420.
[3] Morse *v.* Hovey, 9 Paige, 197; Parshall *v.* Lamoureaux, 37 Barb. 189.
[4] Osborn *v.* Robbins, 36 N. Y. 365; Strong *v.* Grannis, 26 Barb. 122.
[5] Sawyer *v.* Chambers, 43 Barb. 622.
[6] Dig. 44, 1, de exceptionibus, c. 7, § 1; Cod. 2, 24 (23) de fidejuss. 2.
[7] Strahan's Domat, bk. 3, tit. 4, § 5, art. 2; id., bk. 3, tit. 4, § 1, art. 10.
[8] Hagar *v.* Mounts, 3 Blackf. 57; Bryant *v.* Crosby, 36 Me. 562, *Accord.* — ED.

Putnam v Schuyler

Assumpsit on note made by Mrs A, & guaranteed by D. On trial D offered to prove that P had obtained note from Mrs A. by fraud, & without consideration. P contended that D had admitted validity of promise by the guaranty. Evidence excluded below

CJ ~~gave judgment~~ sustained exceptions. Obligee had no claim against principal, & surety secured if on no worse position. New trial awarded.

Hazard v Griswold

Debt against surety on bond. Plea alleged that principal was imprisoned by π's, & because of it, Δ & principal signed the bond. Plea did not allege Δ's ignorance of duress on principal. Demurrer.

It sustained demurrer. Duress is only personal defense & if it is to be relied on by surety, he must allege ignorance of the duress at time of execution.

HAZARD AND OTHERS v. GRISWOLD.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF RHODE ISLAND, AUGUST 4, 1884.

[*Reported in* 21 *Federal Reporter*, 178.]

ACTION of Debt on Bond.

Edwin Metcalf, for plaintiffs.

Saml. R. Honey and *Arnold Greene*, for defendant.

Before GRAY and COLT, JJ.

GRAY, Justice. This is an action of debt, commenced in the Supreme Court in the State of Rhode Island, on March 3, 1883, by four citizens of Rhode Island against a citizen of New York, on a bond dated August 24, 1868, and executed by Thomas C. Durant as principal, and the defendant and S. Dexter Bradford as sureties, binding them jointly and severally to the plaintiffs in the sum of $58,735.

The fifth plea[1] alleges that Durant, at the time and place of the making of the supposed writing obligatory, "was unlawfully imprisoned by the said plaintiffs and others in collusion with them, and then and there detained in prison, until, by the force and duress of imprisonment of him, the said Thomas C. Durant, he, with the said defendant as surety, made the said writing, signed and sealed and delivered the same to the said plaintiffs as their deed." To this plea the plaintiffs have demurred, because it does not allege that the writing was executed by the defendant under force and duress of imprisonment of himself, nor that he did not voluntarily execute it as surety with knowledge that it was executed by Durant as principal under force and duress of imprisonment, as alleged in the plea. This plea does not set forth facts enough to make out a defence. Duress at common law, where no statute is violated, is a personal defence, which can only be set up by the person subjected to the duress; and duress to the principal will not avoid the obligation of a surety; at least, unless the surety, at the time of executing the obligation, is ignorant of the circumstances which render it voidable by the principal. Thompson *v.* Lockwood;[2] Fisher *v.* Shattuck;[3] Robinson *v.* Gould;[4] Bowman *v.* Hiller;[5] Harris *v.* Carmody;[6] Griffith *v.* Sitgreaves.[7] The case of Hawes *v.* Marchant,[8] in this court, was not a case of duress at common law, but of oppression by the illegal exercise of official power in excess of statute authority, and was decided upon that ground.

Demurrers sustained.[9]

[1] Only what relates to this plea is here given. — ED.

[2] 15 Johns. 256. [3] 17 Pick. 252. [4] 11 Cush. 55.

[5] 130 Mass. 153. [6] 131 Mass. 51. [7] 90 Pa. St. 161.

[8] 1 Curtis, 136.

[9] Huscombe *v.* Standing, Cro. Jac. 187; Wayne *v.* Sands, Freem. 351, 3 Keb. 238, s. c.; Mantel *v.* Gibbs, Brownl. 64; McClintick *v.* Cummins, 3 McL. 158 (*semble*); Plummer *v.* People, 16 Ill. 358; Tucker *v.* State, 72 Ind. 242 (*semble*); Jones *v.* Turner,

GRIFFITH AND OTHERS v. SITGREAVES.

IN THE SUPREME COURT, PENNSYLVANIA, APRIL 4, 1879.

[*Reported in* 90 *Pennsylvania Reports*, 161.]

APRIL 4th, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKEY, and STERRETT, JJ.

Error to the Court of Common Pleas of Northampton County: Of January Term, 1879. No. 232.

Assumpsit by Matthew H. Griffith, James Roberts, and J. Milton Butler, partners, trading as Griffith, Roberts, & Butler, against Theodore R. Sitgreaves, to recover $2,903.68, the amount of seven promissory notes, of which defendant was the accommodation indorser for Robert C. Pyle, the maker. The defendant pleaded *non assumpsit*. A jury trial was dispensed with.

The Court having found the fact that the notes were signed and delivered by Pyle to the plaintiffs under and by reason of duress of imprisonment and duress *per minas*, *held*, that the same were absolutely void as against Pyle as maker and Sitgreaves as indorser in the hands of a person who was a party to said duress, or of a holder who had notice thereof before he received said notes. And that in an action on said notes by the plaintiffs against Sitgreaves, it was competent for the latter to set up as a defence the duress of Pyle, and especially so where the fact was found as in this case, that the duress was effected through the agency of one of the plaintiffs in this action.

Exceptions were filed to this decision which the Court overruled.[1]

W. W. Schuyler, for plaintiffs in error.

H. Green, for defendant in error.

Mr. Justice PAXSON delivered the opinion of the Court May 7th, 1879.

We are next to consider the question whether the defendant, who is sued as indorser of the notes, can take advantage of the duress practised upon the maker. In Huscombe *v.* Standing,[2] the defendant having been sued on a bond, on which he was surety for one Street, entered a plea that the bond was obtained by duress of his principal. The plaintiff demurred to this plea, and, without argument, it was held that "it was not any plea for the surety, although it had been a good

5 Litt. 147 (*semble*); Thompson *v.* Buckhannon, 2 J. J. Marsh. 416 (*semble*); Oak *v.* Dustin, 79 Me. 23; Robinson *v.* Gould, 11 Cush. 55; Bowman *v.* Hiller, 130 Mass. 153: Harris *v.* Carmody, 131 Mass. 51, 53; Thompson *v.* Lockwood, 15 Johns. 256 (*semble*), *Accord*.

In Strong *v.* Grannis, 26 Barb. 122, a defendant, who signed a note as surety with knowledge of the duress practised upon the principal maker, successfully resisted an action brought by the holder of the note. But in this case the arrest was procured by the perjury of the payee. — ED.

[1] The statement of facts is abridged, the arguments are omitted, together with a part of the opinion not relating to suretyship. — ED.

[2] Cro. Jac. 187

plea for the said Street; for none shall avoid his own bond for the imprisonment or duress of any other than himself. The same doctrine is recognized in Bacon's Abridg., title Duress A., and 2 Rolle's Abridg. 124. The later authorities are conflicting, with no adjudicated case in Pennsylvania. Mantel *v.* Gibbs,[1] Robinson *v.* Gould,[2] Plummer *v.* The People,[3] McClintick *v.* Cummins,[4] and Thompson *v.* Lockwood,[5] were cited by plaintiffs as sustaining the doctrine that the duress which will avoid a contract must be offered to the party who seeks to take advantage of it. On the other hand, Strong *v.* Grannis,[6] Osborn *v.* Robbins,[7] and Fisher *v.* Shattuck[8] were cited on behalf of the defendant as sustaining the opposite view. I have examined these cases with some care, and do not regard them as controlling authority on either side. They depend very much upon the pleadings or their special circumstances. I have no doubt of the correctness of the general principle laid down in the older cases that duress, to be a good plea, must be offered to the person who seeks to take advantage of it. As in the case of two joint and several obligors in a bond, a plea by one defendant of duress practised upon the other would be a bad plea, for the reason that if his signature was obtained without duress, of what consequence is it to him that his co-obligor signed under duress? In all the cases cited, the duress was either upon the party seeking to avoid the instrument sued upon, or it was *known* to him. Thus, in Robinson *v.* Gould,[2] the action was on a note made by A to B, to procure the release of C from an unlawful arrest, brought about by B. Here A entered into an independent contract, not as surety, but as principal, with a full knowledge of all the facts, and as the Court said, upon a sufficient consideration: "The case, therefore," in the language of the Court, "is exactly this: a promise by the defendant, upon a valid consideration, fully assented to by him without coercion or restraint of any kind." McClintick *v.* Cummins[4] decides nothing that affects the case in hand. The Court said: "It is not necessary to decide this question (the duress), as, from the facts, it does not appear that the imprisonment of Johnson was unlawful, or that he was detained until he executed the notes." Plummer *v.* The People,[3] was a suit upon a recognizance against the principal and the sureties. The principal was committed by a magistrate in the State of Illinois for a larceny committed in another State. Afterwards, the magistrate, in the absence of the accused, and without proof, made out a second *mittimus* for an offence committed within the State. The accused, to relieve himself from confinement, gave the recognizance in question. The defendants pleaded duress, and the Court below gave judgment in their favor upon the plea. The Court above affirmed the judgment as to the principal, and reversed it as to his sureties, saying: "I do not hold that the same facts might not also have been made available by

[1] 1 Brownlow, 62.
[2] 11 Cush. 155.
[3] 16 Ill. 358.
[4] 3 McLean, 158.
[5] 15 Johns. 259.
[6] 26 Barb. 122.
[7] 36 N. Y. 365.
[8] 17 Pick. 252.

the sureties, at the proper time, and in a proper form of plea, but they cannot avail themselves of them by a plea of duress of their principal." This case recognizes the doctrine I have already suggested, that duress, as a plea, is bad if the duress set up was upon some person other than the party pleading it. It also appeared that the sureties had knowledge of the duress when they signed the recognizance. This was also the case in Strong *v.* Grannis, cited by the defendant. Here the action was against two persons as makers of a promissory note; the defence set up was that the note was executed under duress of imprisonment of one of the makers, and to procure his release therefrom, and was signed by the other as his surety. The Court held that the surety might avail himself of the duress. This was a case in the Supreme Court. Osborn *v.* Robbins was in the Court of Errors and Appeals. The note was given by a son, with his father as surety, in settlement of an arrest upon the charge of rape, under circumstances that indicated an abuse of legal process, for the purpose of oppression. The Court held that the surety could avail himself of the duress. This case is not authority to the extent claimed for it by the defendant, for the reason that the surety was the father of the defendant. This is one of the exceptions recognized in Huscombe *v.* Standing, and most of the old authorities.[1]

It by no means follows that because duress of another is not a good plea, and that in some instances it may not even avail as a defence, that it cannot be set up successfully in any case. Had the defendant, after indorsing these notes, passed them to the plaintiffs and received the money therefor, it is very clear he could not set up the defence of duress of the maker; so if he had indorsed them with notice of the duress, or if the notes were in the hands of an innocent third party for value. In these and many other instances that might be named, the defence referred to would, for obvious reasons, be unavailing. The case in hand, however, differs materially from them and from all the cases cited. Here the defendant was the surety of the maker, nothing more, and defends under the broad plea of *non assumpsit*. The form of the transaction is not material, so long as the contention is between the original parties. The defendant's contract is to pay the notes, if his principal fails to do so; and he may be proceeded against immediately upon such failure. But upon payment of the money he has his remedy over against his principal. It is a recognized doctrine in the law of surety, that whatever discharges the principal debtor, also discharges the surety. There are exceptions to the rule, as where one had signed a joint and several note with a married woman as surety. 1 Pars. on Bills and Notes, 244. Nor will this rule apply to cases in which a surety is required, for the very reason that the principal *may* have a defence that will defeat the claim against him.

[1] For additional illustrations of this exception, see McClintick *v.* Cummins, 1 McLean, 158, 159; Plummer *v.* People, 16 Ill. 358, 360; Harris *v.* Carmody, 131 Mass. 51; Owens *v.* Mynatt, 1 Heisk. 675. — Ed.

Griffith v Gallagher

notes were signed by one Pyke while under duress. They were then sent to Δ as accomodation indorser, who knew nothing of duress practised by Π. Suit by Π to recover on note. Δ pleaded non assumpsit. Lower ct charged that these were absolutely voides against maker & Δ.

sup ct affirmed this. Although in good hands [illegible] by party who practised duress, yet here it is a good defense because Δ that he would have nothing to do with instrument, tainted not to knowledge of Π, & so is protected as innocent holder on note.

dictum that if Δ had knowlege of duress he would be liable.

Sawyer v Chambers et al

Π's agreed to sell goods to a firm, & Δ gave note for price, on which Δ was a surety. Only small part of goods was delivered, thus having a failure of consideration, & those delivered had been paid for. Δ sets up failure of consideration as a defense to note. Evidence objected to but admitted, & so for Π.

sup ct ~~granted judgment for Δ~~ ordered new trial. maker certainly has a defense in such a case, & surety should have same as Δ, i.e. be liable only to extent principal is, & here that is nothing under evidence.

In these and the like cases, the surety knows when he binds himself that he has no remedy over. He is not, therefore, misled. The defendant indorsed the notes without any knowledge, or anything to put him upon inquiry, of the duress practised upon his principal. The result will be, if a recovery is had against the defendant, he will have no redress against the maker, and this by reason of the duress upon the maker, the act of the plaintiffs. He is therefore directly injured by it, and has a right to defend upon that ground. Had he signed the notes with knowledge of the duress, it would have been his own folly, and the consideration being good, the plaintiffs would have been entitled to recover. But they made the mistake of keeping the maker a *quasi* prisoner in New York by threats of an arrest, whilst the notes were sent to the indorser for his signature, thus depriving him of his remedy over against his principal. In doing this, the plaintiffs overreached themselves. *The judgment is affirmed.*[1]

SAWYER AND OTHERS v. CHAMBERS AND OTHERS.

IN THE SUPREME COURT, NEW YORK, NOVEMBER, 1864.

[*Reported in* 43 *Barbour*, 622.]

ACTION upon a promissory note, against the indorsers.[2]

By the Court, INGRAHAM, J. The defence set up in this case must be considered as sufficiently alleged in the answer, as the answer was amended by the Court to embrace the facts so stated.

Whether this is to be considered an offer to show a total or partial failure of consideration between the plaintiffs and the makers, is immaterial. Between the original parties such a defence is admissible. The offer was to show that the whole consideration of the note, or the greater part of it, had failed; that the note was given on account of the goods, which the plaintiffs had agreed to sell to the company; that only a small portion of such goods had been delivered, and that the amounts so delivered had been actually paid for. I am at a loss to see any ground on which this evidence could be excluded.

Surely an accommodation indorser is in no worse condition than the maker. He has a right to any defence which the maker could avail himself of. If the makers had been sued upon the note, they could have shown that the note was given on account of goods to be delivered, and that such goods had never been received. The plaintiffs, under such proof, would have no claim against the defendants, as the

[1] Patterson *v.* Gibson, 81 Ga. 802, *Accord*.
See Hawes *v.* Marchant, 1 Curt. 136, 142. — ED.

[2] Only the opinion of the Court upon the point of suretyship is given. — ED.

note would be without consideration. So long as the courts permit the consideration of a note to be inquired into under any circumstances, the facts presented in the defendants' offer must come within such a rule. The plaintiffs have no right to recover on this note, from any of the parties, anything more than enough to indemnify them for the duck sold or thereafter delivered to the company, and the defence that no such amount of duck had ever been delivered should not have been excluded.[1]

[1] Gunnis *v.* Weigley, 114 Pa. 191, *Accord.* — Ed.

SECTION II.

Defences based upon the Extinguishment or Suspension of the Liability of the Principal Debtor to the Creditor.

PAUL AND WIFE, EXECUTRIX OF DEAN, v. CHRISTIE.

IN THE COURT OF APPEALS, MARYLAND, MAY TERM, 1798.

[*Reported in* 4 *Harris and McHenry*, 161.]

THIS was an action of debt upon a joint and several bond, executed by James Christie, and Robert Christie, the defendant, to the plaintiff's testator, on the 30th of August, 1775. The following case was stated for the opinion of the Court, viz. That the bond, upon which this suit is brought, was duly executed on the 30th of August, 1775, by James Christie and Robert Christie, to Hugh Dean, in his lifetime, in which bond the said James was the principal debtor, and the said Robert bound as his security, jointly and severally. That the said James is and always has been a British subject, and the said Robert is a citizen of this State; and that before the impetration of the writ in this case, the whole of the principal (excepting £5), and all the interest due on the said bond (except the interest accrued from the 4th of July, 1776, to the 3d of September, 1783), were paid by the said James to the plaintiff.

The question was, whether or not the plaintiff ought to recover interest from the 4th of July, 1776, to the 3d of September, 1783 (during the war between this country and Great Britain), from the defendant.

Hollingsworth, for the plaintiffs.

Cooke and *Milligan*, for the defendant.

The General Court were of opinion, that the plaintiffs ought to recover of the defendant the interest on the bond upon which this suit is brought, which accrued during the war between the United States and Great Britain.

Judgment for the plaintiffs on the case stated.[1]

[1] Bean v. Chapman, 62 Ala. 58, *Accord*. In this case Stone, J., delivering the opinion of the Court, said: "It is contended for appellees that being only sureties their liability is accessorial, and that they cannot be held for a greater sum than their principal, Lakin, is liable to pay. The foregoing is certainly the rule in a proper case. Whenever the inquiry is one of original liability the surety cannot be held to a greater extent than the principal is bound for. The principal's obligation defines the boundary upward, beyond which the surety's obligation cannot be carried. So, the creditor can do no act by which he reduces the principal's liability without at the same time reducing the surety's liability, at least to the same extent. But the rule is very different where the law reduces or absolves the principal's liability, without the fault or procurement of the creditor. In such case the principal's defence is personal, and does not affect or impair the surety's liability, unless he also have a personal defence. Discharge of the

WILLIAM H. GUILD *v.* ALFORD BUTLER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 3, 1877.

[*Reported in* 122 *Massachusetts Reports*, 498.]

CONTRACT upon a promissory note made by the defendant payable to Robert W. Dresser & Co. or order, and by them indorsed to the plaintiff.

At the trial in the Superior Court, before PITMAN, J., it appeared that the note was made by the defendant for the accommodation of Dresser & Co., who at the same time gave him an agreement in writing that they would themselves pay the note at maturity; that the plaintiff did not know this when he took the note, but, after learning it, and after the commencement of this action, united with other creditors of Dresser & Co. in a petition in bankruptcy against Herman D. Bradt, the surviving partner of that firm (Dresser, the other partner, having died), and afterwards voted for and signed a resolution of composition under the provisions of the Act of Congress of June 22, 1874, § 17, by which the plaintiff, with the other creditors of Dresser & Co., agreed to take, in full settlement, twenty per cent of their claims, to be paid in three equal instalments, in ten days, three months, and six months from the acceptance of that resolution, which was approved by the Court in bankruptcy and recorded.

The judge instructed the jury that, if the note sued on was an accommodation note, and the defendant, as between him and Dresser & Co., was but a surety, and the plaintiff knew that it was an accommodation note when he entered into the resolution of composition, the fact of his entering into that resolution would constitute a defence to this action. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

P. H. Hutchinson, for the plaintiff.

R. Stone, Jr., for the defendant.

GRAY, C. J. By the existing acts of Congress upon the subject of bankruptcy, a bankrupt's estate may be settled, and the bankrupt discharged, in either of three ways: —

First. The estate may be administered in the ordinary manner by assignees appointed for the purpose, and a certificate of discharge be

principal in bankruptcy, statute of limitations, or, if he be dead, failure to present or file the claim against his estate within the time required by law, are of this class. Minter *v.* Br. Bank, 23 Ala. 762; Hooks *v.* Br. Bank, 8 Ala. 580; Cawthorne *v.* Weissinger, 6 Ala. 714; Woodward *v.* Cligge, 8 Ala. 317. In such cases the surety can pay the debt at any time after it matures, and then proceed against the principal for money paid for his use, and at his request. Whether if the present defendants pay this debt, they cannot recover of Lakin, their principal, the whole sum they have to pay, including interest, is a question we need not here discuss."

Gould v Butler

Δ signed accommodation note, being surety for firm. Firm went bankpt + only survivor also went bankpt. T found out as to accommodation before bankptcy, + then united in composition with other creditors agreeing to take 20%, to be paid in certain instalments. Judge instructed jury that this was a defense to Δ.

Sup ct sustained exceptions. As to deed of composition, assent of certain no of creditors in composition has to be presented to Ct before it is binding, + then it binds such creditors, being thereby operation of law. This does not affect or change the liability of the surety.

Δ title in that advancement would pass if he executed to a certificate of discharge of bankpt, or to a winding up of estate through trustees.

granted by the Court, with the assent, in some cases, of a certain proportion of the creditors who have proved their claims. Any person liable as surety for the bankrupt may, upon paying the debt, even after the commencement of proceedings in bankruptcy, prove the debt, or stand in the place of the creditor if he has proved it; or, the debt not having been paid by him nor proved by the creditor, may prove it in the name of the creditor or otherwise. U. S. Rev. Sts. § 5070; Mace v. Wells;[1] Hunt v. Taylor.[2] But the surety's liability to the creditor is not affected by any certificate of discharge granted to the principal.[3] U. S. Rev. Sts. § 5118; Flagg v. Tyler.[4]

Second. The estate may be wound up and settled by trustees nominated by the creditors, upon a resolution passed at a meeting for the purpose by three-fourths in value of the creditors whose claims have been proved, and confirmed by the Court, and upon the signing and filing, by such proportion of the creditors, of a consent in writing that the estate shall be so settled; in which case such consent and the proceedings under it bind all creditors whose debts are provable, even if they have not signed the consent nor proved their debts; the trustees have the rights and powers of assignees; the winding up and settlement are deemed proceedings in bankruptcy; the Court may summon and examine on oath the bankrupt and other persons, and compel the production of books and papers; and the bankrupt may obtain a certificate of discharge in the usual manner. U. S. Rev. Sts. § 5103.

Third. The creditors, at a meeting ordered by the Court, either before or after an adjudication of bankruptcy, may resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due them from him. Such resolution, to be operative, must be passed by a majority in number of the creditors whose debts exceed fifty dollars in value, and by a majority in value of all the creditors, and must be confirmed by the signatures of the debtor, and of two-thirds in number and one-half in value of all his creditors. The debtor is required to attend at the meeting to answer inquiries, and to produce a statement of his assets and debts and of the names and addresses of his

[1] 7 How. 272.

[2] 108 Mass. 508.

[3] *Ex parte* Williamson, 1 Atk. 82; Brown v. Carr, 7 Bing. 508; Moody v. King, 2 B. & C. 558; Ingles v. Macdougal, 1 Moore, 196; London Co. v. Buckle, 4 Moore, 153; Wolf v. Stix, 99 U. S. 1; Knapp v. Anderson, 15 N. B. R. 316; Garnett v. Roper, 10 Ala. 842; Phillips v. Wade, 66 Ala. 53 (overruling Lunsford v. Baskins, 6 Ala 512); King v. Central Bank, 6 Ga. 258; Phillips v. Solomon, 42 Ga. 192; Jones v. Hawkins, 60 Ga 52; Lackey v. Steere, 121 Ill. 598; Gregg v. Wilson, 50 Ind. 490; Post v. Losey, 111 Ind. 74; Ray v. Brenner, 12 Kas. 105; Burtis v. Wait, 33 Kas. 478; Moon v. Waller, 1 A. K. Marsh. 488; Serra v. Hoffman, 30 La. An. 67; Cochrane v. Cushing, 124 Mass. 219; Robinson v. Soule, 56 Miss. 549; Claflin v. Cogan, 48 N. H. 411; Linn v. Hamilton, 34 N. J. 305; Hall v. Fowler, 6 Hill, 630; McCombs v. Allen, 18 Hun, 190; Wilson v. Field, 27 Hun, 46; Jones v. Hagler, 6 Jones (N. Ca.), 542; Bank v. Simpson, 90 N. Ca. 467; Noble v. Scofield, 44 Vt. 281, *Accord*.

But see *contra*, because of the creditor's consent to the discharge of the principal debtor, *In re* Macdonald, 14 N. B. R. 477; Calloway v. Snapp, 78 Ky. 561. — ED.

[4] 6 Mass. 33.

creditors. The resolution, with this statement, is to be presented to the Court; and if the Court, after notice and hearing, is satisfied that the resolution has been duly passed and is for the best interest of all concerned, the resolution is to be recorded and the statement filed, and the provisions of the composition shall be binding on all the creditors whose debts, names, and addresses are shown on the statement, and may be enforced by the Court on motion and reasonable notice, and regulated by rule of court, or may be set aside by the Court for any sufficient cause, and proceedings in bankruptcy had according to law. U. S. St. June 22, 1874, § 17. This section, providing for a composition under the supervision of the Court, is taken from and substantially follows § 126 of the English Bankrupt Act of 1869, St. 32 & 33 Vict. c. 71. See *Ex parte* Jewett;[1] *Re* Whipple.[2]

It has been determined in England, by decisions of high authority and upon most satisfactory reasons, that a creditor, by participating in either of the three forms of proceeding, whether by assenting to a certificate of discharge, or by consenting to a resolution, either for a winding up through trustees, or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety. Browne *v.* Carr;[3] Megrath *v.* Gray;[4] Ellis *v.* Wilmot;[5] Simpson *v.* Henning;[6] *Ex parte* Jacobs,[7] overruling Wilson *v.* Lloyd.[8]

The proceedings for a composition under the statute, depending for their validity and operation, not upon the act of the particular creditor, but upon the resolution passed by the requisite majority of all the creditors, binding alike on those who do and on those who do not concur therein (if their debts are included in the statement filed by the debtor), and finally confirmed and established by the Court upon a consideration of the general benefit of all concerned, differs wholly in nature and effect from a voluntary composition deed, which binds only those who execute it. Oakeley *v.* Pasheller;[9] Bailey *v.* Edwards;[10] Bateson *v.* Gosling;[11] Oriental Financial Corporation *v.* Overend;[12] Cragoe *v.* Jones; Gifford *v.* Allen;[13] Phœnix Cotton Manuf. Co. *v.* Fuller.[14]

Assuming, therefore, that this defendant, having signed the note for the accommodation of the indorsers, was to be considered as a surety for them, and that the plaintiff, after acquiring knowledge of that fact, stood as if he had known it when he took the note, yet no defence is shown to this action. *Exceptions sustained.*[15]

[1] 2 Lowell, 393. [2] Ibid. 404.
[3] 2 Russ. 600; 5 Mo. & P. 497; and 7 Bing. 508.
[4] L. R. 9 C. P. 216. [5] L. R. 10 Ex. 10. [6] L. R. 10 Q. B. 406.
[7] L. R. 10 Ch. 211. [8] L. R. 16 Eq. 60.
[9] 4 Cl. & Fin. 207; s. c. 10 Bligh, N. R. 548.
[10] 4 B. & S. 761. [11] L. R. 7 C. P. 9. [12] L. R. 7 Ch. 142.
[13] 3 Met. 255. [14] 3 Allen, 441.
[15] Megrath *v.* Gray, L. R. 9 C. P. 216; Ellis *v.* Wilmot, L. R. 10 Ex. 10; Simpson *v.* Henning, L. R. 10 Q. B. 406; *Ex parte* Jacobs, L. R. 10 Ch. 211 (overruling Wilson *v.* Lloyd, L. R. 16 Eq. 60); Fisse *v.* Einstein, 5 Mo. Ap. 78; Mason Co. *v.* Bancroft (N. Y. Supreme Ct., 1876), 4 Cent. L. J. 294, *Accord.* — Ed.

W. VILLARS *v.* L. T. PALMER, ADMINISTRATOR, AND ANOTHER.

IN THE SUPREME COURT, ILLINOIS, JANUARY TERM, 1873.

[*Reported in* 67 *Illinois Reports*, 204.]

APPEAL from the Circuit Court of Vermilion County; the HON. JAMES STEELE, Judge, presiding.

This was a bill in Chancery, by William Villars, against Levin T. Palmer, administrator of the estate of Guy Merrill, deceased, and John G. Leverich, to enjoin proceedings at law by Palmer as administrator of the estate of Merrill, for the use of Leverich, upon a promissory note, given by one George W. Taylor as principal, and signed by the complainant as surety, and payable to said Guy Merrill as master in Chancery. The bill showed that the estate of Taylor was solvent, and that the debt could have been made if the claim had been presented before it was barred by the two years' limitation. The Court below dismissed the bill, and the complainant appealed.

Townsend & Young and *E. S. Terry*, for the appellant.

O. L. Davis and *J. B. Mann*, for the appellees.

MR. JUSTICE SHELDON delivered the opinion of the Court: —

The claim on the part of the surety in this case is, that, as by the neglect of the creditor to present his claim against the estate of Taylor, the principal, all remedy in respect to the debt has been lost against the estate of the principal, that should operate to discharge the surety.

The complaint is of mere delay, not of any affirmative act on the part of the creditor, whereby the surety has been affected. But it is the well-established principle, that mere delay on the part of the creditor to proceed against the principal does not discharge the responsibility of the surety.

In cases of this sort, there is not any duty of active diligence incumbent on the creditor. All that the surety has the right to require of the creditor, in the absence of any statute provision, is, that no affirmative act shall be done that will operate to his prejudice. It is his business to see that the principal pays.

The law furnished the surety here with ample remedies for his protection. He might have paid the debt according to his undertaking, and have sued the principal himself; or he might have gone into a court of equity after the debt became due, and obtained a decree that the principal should pay it; or he might, under the statute, have given to the creditor written notice to put the note in suit, and thus have compelled him to sue the principal.

If he has seen fit to lie by, and the neglect to proceed against the principal in his lifetime, or against his estate after his decease, has

been the means of depriving the surety of his indemnity, he must abide by the loss, and cannot throw it upon the creditor.

Without more, we need but to refer to the cases of the People v. White *et al.*, 11 Ill. 342, and Taylor v. Beck, 13 Id. 376, where the subject is fully considered and authorities cited. In the former case, the very point made by the surety here is decided adversely to him.

Under the statute of March 4, 1869, Sess. Laws, 1869, p. 305, where the principal maker of a joint note has departed this life, it is made the duty of the holder of the note to present the same against the estate of the decedent for allowance to the proper court, within two years after the granting of the letters of administration. But that statute is too late to affect the present case.

The decree of the Court below dismissing the bill is affirmed.

Decree affirmed.[1]

AUCHAMPAUGH, Administrator, v. SCHMIDT.

In the Supreme Court, Iowa, April 22, 1886.

[*Reported in* 70 *Iowa Reports*, 642.]

Adams, J.[2] We come, then, to the question raised by the answer and the admitted evidence of suretyship, and that is as to whether a claim which is barred by the Statute of Limitations, as against the principal debtor, is *by reason thereof* barred also as against a surety. In answer to this question, we have to say that we think that it is. No authority has been cited upon either side which is directly in point. Ordinarily, we may presume that, where the statute has fully run as against the principal, it would happen that it had fully run as against the surety. But the case before us has this peculiarity: The defendant, when the note was executed, resided in Illinois. Before the note was barred by the statute of that State he removed to Iowa, and before the statute of this State had fully run, the action was commenced. If, then, the defendant were a principal debtor, the note would not be barred as against him, however it might be as against Leipold. He must therefore rely

[1] Carter v. White, 25 Ch. Div. 666, 672, per Lindley, L. J.; McBoon v. Governor, 6 Port. (Ala.) 32; Hooks v. Branch Bank, 8 Ala. 580; Sichel v. Carrillo, 42 Cal. 500; Bull v. Coe, 77 Cal. 54; Minter v. Branch Bank, 23 Ala. 762; Smith v. Gillam, 80 Ala. 296, 301; People v. White, 11 Ill. 342; Bank v. State, 62 Md. 88; Kerr v. Brandon, 3 Miss. 910; Johnson v. Planters' Bank, 12 Miss. 165; Cohea v. Commissioners, 15 Miss. 437; Sibley v. McAllaster, 8 N. H. 389; Moore v. Gray, 26 Oh. St. 525; Nashville Bank v. Campbell, 7 Yerg. 353; Marshall v. Hudson, 9 Yerg. 57, *Accord*.

Stull v. Davidson, 12 Bush, 167; Bridges v. Blake, 106 Ind. 332, *Contra*.

Compare Ohio v. Blake, 2 Oh. St. 147. — Ed.

[2] Everything is omitted except the opinion of the Court relating to the surety's liability. — Ed.

Villars v Palmer 2 Binn.

note made by one Taylor, on which Π was surety. Taylor is solvent but statute of limitations had run against Taylor, & Δ was sued Villars as surety. Π now asks an injunction restraining the Δ from suing.

Ct dismissed the bill, creditor has died nothing appearing but surety prayed, & this is no defense to the surety, surety could & put creditor to proceed before statute had run, & he loses his right against principal by not compelling suit.

Deschampsneufs v Schmidt

suit against a surety, the claim against principal having been barred by the Statute, & surety claims it of setting up this defense. Ct gave judgment for Δ. Δ ct to give it to set up the matters whereby the principal has discharged surety but is losing this right to reimbursement, & he ct not to suffer by reason of Π's dilatoriness, especially in case where delay is caused at the instance of Π as to their obligations.

Richardson v Horton

signed a joint bond along with one Sir Watts, and Sir Watts died, he being principal, administratrix v Bothom sued, & master allowed the principle sum out of assets of Watts as a specialty debt & Ex is contended that this was not so CT held that on a joint bond, no matter who was principal, only the survivor could be held, especially since intention of parties was to make a joint bond only. There is no legal or equitable remedy out of assets of deceased obligor.

Vide Supp Ursula and others

solely upon the fact that he is surety upon the note, and upon the bar as against Leipold. Such being the case, it is perhaps not surprising that no authority should be cited that is precisely in point. It becomes our duty, therefore, to attempt to determine the case on principle. It would not be denied that a surety upon a note may set up any meritorious defence which the principal, if sued, might set up in his own behalf. Now, when the Statute of Limitations has run as against the principal, the law excuses him from setting up any meritorious defence which he may have, and allows him to rely upon the technical defence of the statute alone. The theory is that he was not under obligations to preserve any longer the evidence of his meritorious defence if he had any, and so the Court will not inquire whether he had such defence or not. The statute has been very properly denominated the statute of repose. As the surety is allowed to set up any meritorious defence which the principal might have set up, we are not able to see why he should be required to preserve the evidence of such defence after the principal was not bound to do so. Again, when a surety pays a debt, it is his right to look to the principal for reimbursement. But a surety paying a debt, after it had become barred as against the principal, would be remediless.[1] Now, we do not think that a creditor, by his own dilatoriness, should be allowed to put the surety in such position. It is not a full answer to say that a surety might have protected himself. It may be conceded that he might. But, practically, sureties often overlook their obligations if their attention is not called to them, and we do not think that the just protection of the rights of the creditor requires that we should hold so strict a rule against them as that for which the plaintiff contends. *Reversed.*

RICHARDSON *v.* HORTON.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., MARCH 17, 1843.

[*Reported in* 6 *Beavan*, 185.]

THE MASTER OF THE ROLLS.[2] It is objected to the Master's finding,[3] that where two are jointly bound and one dies, the obligation survives to the surviving obligor; that no action can be maintained against the executor of the obligor who died first; and that, as an action cannot

[1] But see *contra*, McBoon *v.* Governor, 6 Port. (Ala.) 32; Cawthorne *v.* Weissinger, 6 Ala. 714, 716; Hooks *v.* Branch Bank, 8 Ala. 580; Camp *v.* Bostwick, 20 Oh. St. 337; Marshall *v.* Hudson, 9 Yerg. 57. See also Cohea *v.* Commissioners, 15 Miss. 137. — ED.

[2] Only the opinion of the Court is given. — ED.

[3] Under a decree directing the Master to take an account of the debts of Sir Watts Horton, the Master found that £3,513 were due to the obligees on the joint bond executed by Sir Watts and Thomas Horton. — ED.

be maintained against the executors upon the bond, the bond cannot be the foundation of a claim to a specialty debt in equity.

In answer to this argument, it is not alleged that there was any antecedent joint liability of Sir Watts Horton and Thomas Horton, or that there was any agreement for a joint and several bond, or any mistake in preparing the bond; but it is said, that it could not have been intended to release Sir Watts, who was the principal debtor, or his estate, if he happened to die first, and that therefore the bond ought to be considered as joint and several.

I do not think that this argument can prevail. If the bond had been made joint and several, Thomas Horton might have been sued upon it alone in the lifetime of Sir Watts; and there seems to be no reason even for conjecturing that he would have consented to this, or to do more than make himself jointly liable; and if joint liability was the intention of the parties, nothing is now to be rectified or altered, and the legal consequences must follow. The obligation, by virtue of the joint bond, survived to the surviving obligor, and there was no legal remedy upon the assets of the deceased obligor.[1] There may be a legal debt arising out of the contract against the assets of Sir Watts Horton; but if so, it will not be a debt upon the bond, and must be established by means other than the mere production of the bond.

[1] Other *v.* Iveson, 3 Drew. 177, 182 (*semble*); Johnson *v.* Planters' Bank, 12 Miss. 165, 172 *semble*, *Accord.*

A fortiori, where all the joint obligors are principals, and one dies, the creditor cannot, unless the joint obligation is a partnership obligation, charge the estate of the deceased, even in equity, but must pursue the survivors. Sumner *v.* Powell, 2 Mer. 30, T. & R. 423, s. c.; Clarke *v.* Bickers, 14 Sim. 639; Wilmer *v.* Currey, 2 De G. & Sm. 347; Crossley *v.* Dobson, 2 De G. & Sm. 486; Beresford *v.* Browning, 20 Eq. 564, 569. A *dictum contra* in Thorp *v.* Jackson, 2 Y. & C. Ex. 553, was discredited in Jones *v.* Beach, 2 D. M. & G. 886, 889, and in Other *v.* Iveson, 3 Drew. 177, 182.

But this doctrine of the English courts does not obtain in this country, the creditor, though remediless at law, being allowed to come upon the estate of the deceased obligor in equity. Pickersgill *v.* Lahens, 15 Wall. 140, 144 (*semble*); Cox *v.* Maddux, 72 Ind. 206; Waters *v.* Riley, 2 Har. & G. 305 (*semble*); Marshall *v.* De Groot, 1 Cai. Cas. 122; Smith *v.* Ballentine, 10 Paige, 101; Bradwell *v.* Burwell, 3 Den. 61 (*semble*); Barnes *v.* Brown, 130 N. Y. 372 (*semble*); Kennedy *v.* Carpenter, 2 Whart. 344, 361–362; Hengst's Ap. 24 Pa. 413.

Appointment of Principal Debtor as Executor of the Creditor. Such appointment operating as an extinguishment of the contract of the principal would probably be held to discharge the surety. See Cheetham *v.* Ward, 1 B. & P. 630.

Marriage of Creditor with Principal Debtor. The surety has been held to be discharged by the marriage of the creditor and principal. Govan *v.* Moore, 30 Ark. 667. —Ed.

AMES v. MACLAY and Others.

In the Supreme Court, Iowa, December 15, 1862.

[*Reported in* 14 *Iowa Reports*, 281.]

Complainant and others were the sureties upon the bond of one McDonald, who was elected sheriff of Clinton County in 1851. For an alleged nonfeasance, Maclay sued on this bond in 1854. The principal and his sureties severed in their defences. A demurrer of the sureties in that action to the reply of the plaintiff was overruled, and judgment was rendered against them. On the trial of the issues between Maclay and the sheriff, the latter succeeded. A motion was made by the sureties to set aside the judgment against them, which, as far as shown by the record, was not determined. Complainant now brings this bill to set aside said judgment. The cause was referred to a Master, who recommended that the bill should be dismissed. This report was confirmed, and complainant appeals.

A. R. Cotton, for the appellant.

Grant & Smith, for the appellee.[1]

Wright, J. The judgment upon demurrer against the sureties was rendered on the 4th of March, 1848. The verdict and judgment in favor of McDonald, the principal, was on the 5th of the month.

Respondents resist the relief asked, upon the ground that there was neither accident, mistake, misrepresentation, nor fraud, and that Chancery has no jurisdiction, although the party has lost his remedy at law through ignorance of a fact which he might have learned with due diligence and inquiry, or by bill of discovery. Penny *v.* Martin.[2] Or, the same principle may be stated as in Ballance *v.* Loomis,[3] that if a party seeks to set aside a judgment by proceeding in Chancery, he must show himself clear of all laches, and also that every effort was made to prevent a judgment against him. Or, still again, as in Kreichbaum *v.* Bridges & Powers,[4] following Story's Eq. Jur. § 887, that to authorize relief against a judgment, it must appear that it is against conscience to execute it, and also that the injured party could not have availed himself of the main facts, at or before the trial, and that there was no fault or negligence on his part. And see Houston *v.* Wolcott.[5]

Complainant does not controvert these principles, but places his case upon the ground that as the principal, McDonald, by the verdict and judgment was discharged from his liability, the sureties are, in equity, discharged. And this proposition he bases upon the doctrine that the rights of the surety, and his relation to his principal are the same after as before judgment, and that when from any cause the principal ceases to be bound, the liability of the surety should likewise cease. Or, follow-

[1] The citations of counsel are omitted. — Ed.

[2] 4 John. Ch. 566.

[3] 22 Ills. 82.

[4] 1 Iowa, 14.

[5] 7 Iowa, 173.

ing Jackson v. Griswold,[1] the argument is this: that a decision against the debt discharges the surety. And this, not upon the ground that he is a party to such decision, but because the judgment extinguishes the debt; and the principal thing being thus destroyed, the incident (the obligation of the surety) is destroyed with it. The effect is the same as a release by the creditor, or a payment by the debtor, who may do any act in discharge of his surety, but nothing by which he shall be concluded beyond his original objection.

As favoring these views, complainant cites a number of cases, to the effect that if the creditor after judgment shall disable himself from collecting his debt from his principal debtor, he is held to have exonerated the surety also. Of this class is Hubbell v. Carpenter,[2] where the creditor after judgment gave the maker of the note an obligation not to collect the same against him, but reserved the right to enforce it against the indorser. So, in the Manufacturers' and Mechanics' Bank v. The Bank of Pennsylvania,[3] where the creditor after judgment entered into an agreement with the maker of the note to stay proceedings against him. And substantially to the same effect is Storms v. Thorn,[4] and the other authorities cited.[5] We are not inclined, however, to give these cases weight, as applied to this case. To make them applicable we must first assume that the judgment in favor of the sheriff was the *act* of the creditor, after judgment against the sureties, in the same sense and to the same effect as the stipulation to give time to the principal debtor, or an agreement to release him. The reasoning which upholds this proposition is not tenable. If the judgment in favor of McDonald in equity discharges the sureties from their liability, it must be not because it was the agreement or act of Maclay,

[1] 4 Hill, 529.
[2] 5 Barb. 520.
[3] 9 Watts & Serg. 335.
[4] 3 Barb. 314.

[5] If the creditor has obtained a judgment against a surety, a subsequent release or suspension by him of his remedy against the principal debtor has been properly held to give the surety no common law defence to the enforcement of the judgment against him. Pole v. Ford, 2 Chitty, 125; Bray v. Manson, 8 M. & W. 668; La Farge v. Herter, 3 Den. 157.

In Jenkins v. Robertson, 2 Drew. 351, and Findley v. U. S. Bank, 2 McL. 44, the surety was held to be defenceless even in equity. But these cases must be deemed erroneous. Relief in equity is given to the surety almost everywhere in this country. *In re* McDonald, 14 N. B. R. 477; Carpenter v. Devon, 6 Ala. 718; Morley v. Dickinson, 12 Cal. 561; Curan v. Colbert, 3 Ga. 239; Trotter v. Strong, 63 Ill. 272; Gipson v. Ogden, 100 Ind. 20; Chambers v. Cochran, 18 Iowa, 159; Sherraden v. Parker, 24 Iowa, 28; Gustine v. Union Bank, 10 Rob. (La.) 412; Carpenter v. King, 9 Met. 511; Moss v. Pettingill, 3 Minn. 217; Anthony v. Capel, 53 Miss. 350; Rice v. Morton, 19 Mo. 263; Smith v. Rice, 27 Mo. 505; Westervelt v. Frech, 33 N. J. Eq. 451; Boughton v. Orleans Bank, 2 Barb. Ch. 458; Storms v. Thorn, 3 Barb. 314; Hubbell v. Carpenter, 5 Barb. 520 (reversing s. c. 2 Barb. 484, and explaining Bay v. Tallmadge, 5 Johns. Ch. 305; La Farge v. Herter, 3 Den. 157; and Lenox v. Prout, 3 Wheat. 520); Bangs v. Strong, 4 N. Y. 315, 7 Hill, 250, 10 Paige, 11; Cooper v. Wilcox, 2 Dev. & B. Eq. 90; Dixon v. Ewing, 3 Oh. 280; Comm. Bank v. Western Bank, 11 Oh. 444; Blazer v. Bundy, 15 Oh. St. 57; Manufacturers' Bank v. Pa. Bank, 7 W. & S. 335 (see Hagey v. Hill, 75 Pa. 108, 111); Shelton v. Hurd, 7 R. I. 403; Parker v. Nations, 33 Tex. 210 (statutory); Baird v. Rice, 1 Call, 18; Shields v. Reynolds, 9 W. Va. 488.

but because it being determined that the principal is not liable, the incidental liability, that of the sureties, likewise ceases.

Chitty, in his work on Contracts, 460, quoting from Pothier, says that: "It results from the definition of a surety's engagement as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessory obligation that it cannot exist without its principal; therefore, whenever the principal is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that *the surety is only obliged on behalf of a principal debtor, he therefore is no longer obliged when there is no longer any principal for whom he is obliged.*" This rule comports with the duties and relations of the surety to the principal, accords with reason and good conscience, and is fully recognized by the authorities. Is there, then, in this case, any technical or stern rule of the law to prevent its application? We conclude not, and that we can do what right reason and good conscience dictate, without running counter to the rule which requires diligence from suitors in all courts, or the equivalent principle that a party who applies for relief against a judgment at law must show injustice, and that he has been without fault or negligence.

What are the facts of this case? McDonald, the sheriff, was the principal, and of course primarily and principally liable for the alleged nonfeasance. He, after a full and fair trial, has been entirely and absolutely released from his liability. In other words, it has been authoritatively determined by the judgment of a competent tribunal that the alleged nonfeasance was not established, and that plaintiff (one of the present respondents) had no cause of action. By this adjudication the principal "is no longer obliged," or obligated, so far as the claim of Maclay is concerned. Now, does it accord with the alphabet principles governing the relation of principal and surety that the latter shall be obliged to pay that for which the former is no longer liable? Or rather, is it not consistent with every rule governing the relation that as the condition of the surety is to be favored, he should not be required to pay a debt which he can never recover from his principal, the principal obligation having been extinguished?

But it is suggested that this view loses sight of the fact that the sureties severed in their pleas, and that they were guilty of negligence in not relying upon the same defence as that made by their principal. We are not unmindful of the, at least, apparent strength of the argument. It is to be remembered, however, that judgment was rendered against the sureties before the issues were tried between their principal and the creditor. It was, therefore, practically impossible for them to rely upon such subsequent adjudication as a protection to themselves. And then suppose they had pleaded the same defence, and the result had been the same as it was. Would this have been such diligence as to obviate the effect of the rule for which respondents insist? If it

would, we confess that we cannot see how they should be placed in any worse position by having mistaken their proper legal defence.

But the argument that the sureties are concluded and forever estopped from resisting the judgment against them by their failure to present their proper defence is radically defective in that it ignores the great general principles at the foundation of their liability, and continues the accessory obligation after that which induced it has been completely extinguished. We would not say that if the principal had been discharged before, and the sureties had failed to rely upon that fact as a legal defence, they could be afterwards heard in equity. That case is not before us. They could not avail themselves of a defence which did not exist. Their failure to make the same defence as their principal should not, in equity, conclude them to the extent of compelling the payment of money for their principal, for which it is conclusively and finally settled he was never liable. Indeed, under such circumstances, we do not believe that a case can be found sustaining such liability.

We give no weight to the fact that a motion was made to set aside the judgment. No action was ever taken upon it. Complainant might, therefore, resort to his concurrent equitable remedy. This he has done. The decree is *Reversed.*[1]

[1] Norris *v.* Pollard, 75 Ga. 358; Dickason *v.* Bell, 13 La. An. 249; Miller *v.* Gaskins, Sm. & M. Ch. 524, *Accord.*

In accordance with the doctrine of the principal case, a surety may defeat the creditor in an action against himself by setting up a judgment against the creditor in a prior proceeding against the principal debtor. Drummond *v.* Prestman, 12 Wheat. 515 (*semble*); State *v.* Parker, 72 Ala. 181; Brown *v.* Bradford, 30 Ga. 927; Baker *v.* Merriam, 97 Ind. 539; Crum *v.* Wilson, 61 Miss. 233; State *v.* Coote, 36 Mo. 437; Stoops *v.* Wittler, 1 Mo. Ap. 420, 422; Gill *v.* Norris, 11 Heisk. 614. The case of State Bank *v.* Robinson, 13 Ark. 214, *contra*, is likely to be overruled.

Effect of Judgment against Principal in a Subsequent Proceeding against Surety. — It would seem to be clear, upon principle, that the surety, when sued by the creditor, should not be prejudiced by a prior judgment against the principal debtor. Accordingly, such a judgment was not admitted as evidence in the following cases: *Ex parte* Young, 17 Ch. Div. 668; Lucas *v.* Bond, 6 Ala. 826; Fireman's Co. *v.* McMillan, 29 Ala. 147; Arrington *v.* Porter, 47 Ala. 714; Pico *v.* Webster, 14 Cal. 202; Governor *v.* Shelby, 2 Blackf. 26; Lastigue *v.* Baldwin, 5 Martin (La.), 193; De Greiff *v.* Wilson, 30 N. J. Eq. 435; Douglass *v.* Howland, 24 Wend. 35; Jackson *v.* Griswold, 4 Hill, 522; Moss *v.* McCullough, 5 Hill, 131; People *v.* Russell, 25 Hun, 524; McKellar *v.* Bowell, 4 Hawks, 34; Giltinan *v.* Strong, 64 Pa. 242; State *v.* Cason, 11 S. Ca. 392.

But in the following cases the judgment against the principal was held to be admissible as *prima facie* evidence of the validity of the creditor's claim against the surety: Drummond *v.* Prestman, 12 Wheat. 515 (*semble*); State *v.* Martin, 20 Ark. 629; Taylor *v.* Johnson, 17 Ga. 521; Weaver *v.* Thornton, 63 Ga. 655; Graves *v.* Bulkley, 25 Kas. 249; Fay *v.* Edmiston, 25 Kas. 439; Whitehead *v.* Woolfolk, 3 La. An. 42; Macready *v.* Schenck, 41 La. An. 456; Iglehart *v.* Mackubin, 2 Gill & J. 235 (overruling Beall *v.* Beach, 3 Har. McH. 242); Parr *v.* State, 71 Md. 220; Lowell *v.* Parker, 10 Met. 309; Lafayette Association *v.* Kleinhoffer, 40 Mo. Ap. 388; Commissioners *v.* Butt, 2 Oh. 348; State *v.* Colerick, 3 Oh. 487; State *v.* Roswell, 14 Oh. St. 73; Atkins *v.* Baily, 9 Yerg. 111; Barksdale *v.* Butler, 6 Lea, 450; Munford *v.* Overseers, 2 Rand. 313; Jacobs *v.* Hill, 2 Leigh, 393; Stephens *v.* Shafer, 48 Wis. 54.

Ames v Maclay

Π was a surety on a sheriff's bond, & sued surety & sheriff, & they severed in their pleas, Judgment was given against Π, & then in favor of sheriff, Π now brings bill to set aside the judgment against him, Lower Ct dismissed bill,

Ct reversed lower Ct, & set judgment aside, obligation of principal is the chief obligation, & that of surety is incidental, & when one falls, the other falls also, So when principal was found not guilty here, the surety also is released, Δ makes no difference that Π may have entered & pleaded the wrong defense,

PETTY *v.* COOKE.

IN THE QUEEN'S BENCH, JUNE 22, 1871.

[*Reported in Law Reports*, 6 *Queen's Bench*, 794.]

DECLARATION by payee against maker of a promissory note for £100, with interest, payable on demand.

Fifth plea, on equitable grounds, that the defendant made the note jointly with S. D. Steele, for the accommodation of S. D. Steele, and as his surety, of which the plaintiff at the time of making of the note had notice. And that after the note became due S. D. Steele paid the full amount due to the plaintiff in satisfaction of the note.

Replication, on equitable grounds, that the payment of the note was a fraudulent preference, being made voluntarily by Steele in contemplation of bankruptcy; that plaintiff was wholly ignorant that the payment was a fraudulent preference; and that the payment was afterwards avoided by the trustees of Steele in bankruptcy, and the plaintiff repaid, as he lawfully must, the amount of the note to the trustees.

Demurrer and joinder in demurrer.[1]

Herschell, in support of the demurrer. The replication is no answer to the pleas. The creditor, by accepting payment of his debt from the principal debtor, has discharged the surety. Payment under a fraudulent preference is not void but voidable; when the payment was made it was not a void payment, and there was a time when the surety could have pleaded it as a discharge. There was also an interval of time during which the surety had lost the right to step in and become the creditor of the principal debtor; the surety is prejudiced in having lost that right; the payment by the principal debtor is therefore a good payment so as to discharge the surety. Any contract between the creditor and the principal debtor prejudicial to the rights of a surety discharges the surety.

[BLACKBURN, J. Is there any case which says that an innocent act unconsciously done discharges the surety? In Hulme *v.* Coles, the Vice-Chancellor says: "The principle of discharging a surety by the giving of time by the creditor is a refinement of a court of equity, and I will not refine upon it." I also think we ought not to refine upon that doctrine.]

See also Stoops *v.* Wittler, 1 Mo. Ap. 420; Cormack *v.* Commonwealth, 5 Binn. 184, where the surety had been given an opportunity to defend the suit against the principal.

In Massachusetts, the Court has gone so far as to make the judgment against the principal conclusive evidence of the creditor's right against the surety. Tracy *v.* Goodwin, 5 All. 409; Dennie *v.* Smith, 129 Mass. 143. — ED.

[1] The statement of the pleadings is abridged; the concurring opinions of LUSH and HANNEN, JJ., and portions of the arguments are omitted. — ED.

BLACKBURN, J. It seems to me clear, both in equity as well as law, that the plaintiff is entitled to sue the surety, and that there is nothing stated in the pleadings which has discharged the latter from liability. As early as Rees *v.* Berrington,[1] a case decided in 1795 by Lord Loughborough, it was held, on what certainly seems artificial reasoning, that where time is given by a creditor to a principal debtor without the consent of the surety, the surety is in equity discharged, however short the time may be, on the ground that he is thereby deprived of his right on paying off the creditor to sue the principal debtor. Lord Eldon, also, in Samuell *v.* Howarth, cited in the notes to Rees *v.* Berrington,[2] says: "The rule is that if a creditor without the consent of the surety gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of *positive contract*, between the creditor and the principal — not where the creditor is merely inactive. And in the case put, the surety is held to be discharged, for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract. . . . It has been truly stated that the renewal of these bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right, it is against the faith of his contract to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." I think it impossible to read the principle laid down by Lord Eldon without thinking that it is based upon highly technical reasoning, however accurate it may be. It is clear that a creditor who gives time to the principal debtor without reserving his right against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is to my mind not justice, although established by courts of equity. The ground, however, on which this doctrine is based, is that by giving time to the principal debtor the creditor does an act which is against good faith, and injurious to the surety; that doctrine cannot apply to the present case, for the creditor accepted money which he had no right to refuse, and the acceptance of which he had no means of knowing would injure the surety. He therefore did no act injurious to the surety, and the surety is not discharged. I think Pritchard *v.* Hitchcock[3] is in point. *Judgment for the plaintiff.*[4]

[1] 2 Ves. 540; 2 Wh. & T. L. C. (Eq.) 3d ed. 887.

[2] 2 Wh. & T. L. C. (Eq.) 3d ed. 895.

[3] 6 M. & G. 151.

[4] In Watson *v.* Pogue, 42 Iowa, 582; Harner *v.* Batdorf, 35 Oh. St. 113, the creditor was allowed to charge the surety, although he received payment from the principal with knowledge that it was a fraudulent preference. But in Northern Bank *v.* Cooke,

Petty v Cook

S was surety on a obligation running to Π. Π was paid, but had to give this up later because it was a fraudulent preference Π had no suspicion of wrong. He now tries to hold surety. It gave judgment for Π. surety is usually discharged if his ~~its~~ is ~~re~~altered, but here the act is not injurious to surety, & was done in good faith. Hence surety is not discharged. Rule that C by extending time to P discharges S is based on Tech. reasoning & should not discharge S where he is not injured. However this rule doesn't apply here.

Cragoe v Jones

Δ was surety for one P. It appeared that P had assigned for benefit of creditors, of whom Π was one, & that they had covenanted to release P from debt as if P had been discharged in Bkruptcy. It held that the release here discharged S. Discharge in Bkruptcy releases P, & hence serves as against S, but that is operation of law. Here Π has absolutely released P from all liability by his own act, & has received no $ to do S to sue P, & hence there is unconscionable conduct, & varies S's obligation, & hence Judgment for Δ.

Note that in case of covenant not to sue, or a reservation of rights against surety, this in terms reserved as to the surety against the principal.

CRAGOE v. JONES.

IN THE EXCHEQUER, JANUARY 22, 1873.

[*Reported in Law Reports, 8 Exchequer,* 81.]

KELLY, C. B.[1] I am of opinion that the defendant is entitled to the judgment of the Court. This is a case of creditor, debtor, and surety. One Jones was indebted to the plaintiff in the sum of £100, and the defendant was his surety. The plaintiff now sues the defendant for the debt, and he pleads that the plaintiff has released the debtor without his consent, and he is therefore discharged. Now the law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged.[2] But the plaintiff contends that in this case he has reserved to himself the right to recover against the surety by the deed in which the debtor is released. The plea of the defendant sets forth the deed in *hæc verba;* by which it appears that Jones, the debtor, having assigned all his estate and effects to the plaintiff and another as trustees for the benefit of his creditors, the plaintiff and the other creditors, in consideration of the premises, did release the said Thomas Jones from his (and their) respective debts, "in like manner as if the said Thomas Jones had obtained a discharge in bankruptcy." Now the question is this, what is the effect of a release in these terms upon

13 Bush, 340, the Court declined to follow these cases. See also Newman v. Hazlerigg, 1 Bush, 412.

The surety will not be exonerated if the principal gives to the creditor in payment of the debt a note or other obligation which is void, e. g. for usury, Mitchell v. Cotten, 2 Fla. 136; or as being *ultra vires*, Williams v. Gilchrist, 11 N. H. 535.

But a valid payment by the principal to the creditor destroys the latter's right against the surety. Kinnaird v. Webster, 10 Ch. D. 139; Lackey v. Steere, 121 Ill. 598 (satisfaction by execution of judgment); Petefish v. Watkins, 124 Ill. 384; Rubli v. Norman, 7 Bush, 582; Stewart v. Levis, 42 La. An. 37; Burnet v. Courts, 5 Har. & J. 78; Baugher v. Duphorn, 9 Gill, 314; Merrimack Bank v. Parker, 7 Pick. 88; Chapman v. Collins, 12 Cush. 163; Coots v. Farnsworth, 61 Mich. 497; Foster v. Walker, 34 Miss. 365; Manufacturers' Co. v. Todd, 4 Mo. Ap. 591; Eastman v. Plumer, 32 N. H. 239; Lancey v. Clark, 64 N. Y. 209; Woodman v. Mooring, 3 Dev. 237; Gibson v. Rix, 32 Vt. 824; Felch v. Lee, 15 Wis. 265; Greening v. Patten, 51 Wis. 146. — ED.

[1] Only the opinion of the Chief Baron is given. BRAMWELL, B., concurred. PIGOTT, B., dissented. — ED.

[2] *Release of Principal Debtor.* — *Ex parte* Smith, 3 Bro. C. C. 1; *Ex parte* Wilson, 11 Ves. 410; *Ex parte* Glendinning, Buck, 517; Lewis v. Jones, 4 B. & C. 506; Grundy v. Meighan, 7 Ir. L. R. 519; Bull v. Coe, 77 Cal. 54; U. S. v. Mattoon, 5 Mack. 565; Brown v. Ayer, 24 Ga. 288; Lockwood v. Penn, 22 La. An. 29; Anthony v. Capel, 53 Miss. 350; Hempsted v. Hempsted, 27 Mo. 187; Prior v. Kiso, 81 Mo. 241; Broadway Bank v. Schmucker, 7 Mo. Ap. 171; Kirby v. Taylor, 6 Johns. Ch. 242; Bridges v. Phillips, 17 Tex. 128; Paddleford v. Thacher, 48 Vt. 574, *Accord.* — ED.

the rights and the condition of these three parties? It appears to me that the meaning of these words is clear and unambiguous. If Jones, the debtor, had obtained a discharge in bankruptcy, he would have been discharged not only as against the plaintiff, the creditor, but also as against the defendant, the surety. It seems to me, therefore, free from doubt that the plaintiff by this release, having discharged his debtor as against the surety as well as himself, and without the consent of the surety, the surety is himself discharged.

It is contended that this is a qualified or conditional release; but I look in vain throughout the deed for any words of qualification or reservation, or imposing or creating a condition. It is true that if a debtor has obtained his discharge in bankruptcy the creditor may still recover against the surety, and he or the surety, if he pay the debt, may prove against the debtor's estate under the bankruptcy. If, therefore, the debtor had really become bankrupt and obtained his discharge, although the creditor might have recovered against the surety, notwithstanding the discharge of the debtor, his right or power to do so would have been the act or consequence of the law or the statutes of bankruptcy, whereas here the discharge of the surety is his own act; and he cannot by his own act reserve to himself the right to sue the surety, notwithstanding the discharge of the debtor except by the agreement of the debtor that, notwithstanding his discharge, in case the creditor shall recover against the surety, he will remain liable to the surety for the debt. The whole case upon this deed, simply stated, is that the plaintiff has released his debtor in like manner as if he had obtained a discharge in bankruptcy, and inasmuch as, if he had obtained a discharge in bankruptcy, he would have been absolutely released, and neither the plaintiff nor the defendant could have afterwards sued him for the debt, he is absolutely released now, and as such absolute release was without the consent of the surety, the surety is by law discharged. It is argued that a creditor may release his debtor and reserve to himself the right to sue the surety, and that no doubt may be done, but only where the language of the release, or of the deed in which it is contained, is such that the debtor accepts the release subject to the conditions that he shall remain liable to pay the debt to the surety in case he shall have paid it, whether voluntarily or under process, to the creditor. Such was the case in Bateson *v.* Gosling,[1] where the release was contained in a trust deed under the Bankruptcy Act of 1861, but which was followed by a proviso that if the creditors, including the plaintiff, had any security for their demands, "or any demands against the debtor to the payment whereof any person or persons is or are liable as a surety or sureties; the debtor may execute these presents without prejudice to the same security, or to the claim against any surety or sureties." And this proviso was held to convert the release into a mere covenant not to sue, and to preserve the right of the creditor to sue the surety, and of the surety to sue the debtor; and Willes,

[1] Law Rep. 7 C. P. 9.

J., in his judgment expressly states: "When the release in the deed is looked at, it is in terms a release subject to a proviso, and although but for such proviso it would be an absolute release, so that there could be no proceeding afterwards against a surety, yet the proviso expressly reserves the creditors' remedy against a surety, and stipulates that any creditor may execute the deed without prejudice to his claim against any surety." And again, "But if the principal debtor consented to the creditor having recourse to the surety the latter would not be discharged, and would have his remedy against the principal debtor." So that the release in that case was no discharge of the debtor as against the surety by reason of the proviso. Here there is no such proviso, nor is a single word to be found throughout the deed pointing to any qualification or any reservation whatsoever. The release is in its terms a simple and absolute release by the creditor of his debtor in like manner as if the debtor had obtained a discharge in bankruptcy. If the debtor had obtained a discharge in bankruptcy the surety would have had no right of suit against him, and as the plaintiff, the creditor, has put his debtor in a condition in which the surety has lost his right to proceed against him, and this act has been done by the plaintiff, the creditor, without the consent of the surety, I hold that he has thereby discharged the surety, and this action is therefore not maintainable.

Judgment for the defendant.

PRICE *v.* BARKER.

IN THE QUEEN'S BENCH, FEBRUARY 22, 1855.

[*Reported in* 4 *Ellis & Blackburn*, 760.]

COLERIDGE, J., now delivered the judgment of the Court.[1]

This was an action by the public officer of a banking company against the Executors of George Hopps. The declaration was on a bond conditioned for the security to the bank of a banking account of one William Brown. The plea set out the bond, which was the joint and several writing obligatory of the said George Hopps and William Brown, and then set out a general release, made after the accruing of the causes of action, and averred that the release was made in the lifetime of the said George Hopps without the privity, knowledge, authority, or consent of the said George Hopps. The replication set out the release, which, after general words of release, contained the following proviso. "Provided always, that nothing herein contained shall extend, or be deemed or construed to extend, to prevent the said banking company, their successors or assigns, or the partners for the

[1] Only the opinion of the Court is given.

time being constituting the said company," "from suing or prosecuting any person or persons, other than the said William Brown, his executors, administrators, or assigns, who is, are, shall, or may be liable or accountable to pay or make good to the said banking company all or any part of any debt or debts, sum or sums of money, now due from the said William Brown to the said company, either as drawer, indorser, or acceptor of any bill or bills of exchange or promissory note or notes, or as being jointly or severally bound with the said William Brown in any bond or bonds, obligation or obligations, or other instrument whatsoever, or otherwise howsoever, as if these presents had not been executed; it being understood and agreed that, as regards any such suits or prosecutions, these presents shall not operate or be pleaded in bar, or as a release."

To this replication the plaintiff demurred: and the demurrer was argued before us in the course of the last term.

On the argument two questions arose: —

1st, Whether the general words of the release were restrained by the proviso, so that, in order to give effect to the whole instrument, we must construe it as a covenant not to sue, instead of a release.

And, 2dly, Assuming the deed to operate merely as a covenant not to sue, whether the reservation of rights against other parties than the principal debtor contained in the proviso would prevent the surety from being discharged by a binding covenant to give time to, or not to sue, the principal debtor.

To entitle the plaintiff to our judgment, it must appear that the deed operated only as a covenant not to sue, and that the rights of the plaintiff as against the surety were preserved by the particular reservation in question, notwithstanding such covenant not to sue.

With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman, in Nicholson *v.* Revill,[1] as explained by Baron Parke in Kearsley *v.* Cole,[2] that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see Solly *v.* Forbes;[3] Thompson *v.* Lack;[4] and Payler *v.*

[1] 4 A. & E. 675.
[2] 16 M. & W. 136.
[3] 2 Br. & B. 38.
[4] 3 Com. B. 540.

Price v Barkley

Δ's testator + one Brown were jointly + severally liable on a bond given to secure all indebtedness of Brown to Π's Bk. Brown was principal + Π executed an instrument in form a release to Brown, with a clause of reservation of remedies against surety. Π now sues surety.

At law judgment for Π. Instrument is to be construed to give effect to intent, + her intent was that it should really be a covenant not to sue Brown + on such an instrument, on authority only, the remedies against debtor are preserved, + Δ remains liable on bond.

Homersham[1]) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release. It is impossible to suppose for a moment that the parties to this deed could have contemplated the extinguishment of their rights as against parties jointly liable. It was argued, indeed, that the particular words of the proviso in the present case prevented this construction by appearing to recognize that Brown was not to be sued, and that, in an action against him, the deed was to operate as a release and might be pleaded at bar. The words, however, that the proviso was not to extend to prevent the bank from suing or prosecuting any person or persons other than the said defendant or his representatives, which were said to show that Brown was not to be sued, are quite as applicable to a covenant not to sue as to a release; and the later general words in the conclusion of the deed, "that, as regards any such suits or prosecutions" (against parties jointly liable), "these presents shall not operate or be pleaded in bar," are, we think, like the words of actual release, too general to prevent us by inference from giving effect to the plainly expressed intention that the parties jointly liable should not be discharged by an extinguishment of the debt. If, therefore, the testator, whom the defendants represent, had been in the situation of co-obligor merely, we should think that he was not discharged by the deed in question.

It remains, however, in the second place, to consider what effect the deed had upon his liabilities in reference to his relation as surety for Brown, the principal debtor. It was thrown out, indeed, in argument, that we were bound to consider him as a principal debtor and not as a surety upon this bond, the obligatory part of the bond being joint and several without any reference to either being surety or principal. But, for the purpose of seeing the relation of the parties, we must look at the condition of the bond, as set out upon the pleadings, which plainly discloses that the defendant was a surety for the liabilities of Brown.

If the question, whether a covenant not to sue, qualified by such a proviso as that in the present case, and entered into by the creditor without the consent of the surety, discharges the surety, were a new one unaffected by authority, we should pause before deciding that such a case does not fall within the general rule of the creditor discharging a surety by entering into a binding agreement to give time to his principal debtor; and we should have thought the forcible observations of Lord Truro in the recent case of Owen v. Homan[2] entitled to much consideration. We find, however, that the Court of Exchequer in a solemn and well-considered judgment, in the case of Kearsley v. Cole,[3] after referring to all the authorities, states that the point must "be considered as settled;" and they rest their judgment upon this, although it was not necessary to decide it, as the surety in that case had consented to the deed: which consent they treat indeed as an additional reason; but they expressly state that it was not necessary. They state that they

[1] 4 M. & S. 423. [2] 3 Macn. & G. 378. [3] 16 M. & W. 128, 136.

"do not mean to intimate any doubt as to the effect of a reserve of remedies without such consent;" and they add that "the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with or giving time to a debtor by a binding instrument;" and they then explain how it is that, in their judgment, the reserve of remedies has that effect. After this judgment, and after the strong expression of opinion by the present Lord Chancellor in his judgment in the House of Lords in the case of Owen *v.* Homan,[1] where he dissents from the remarks made by Lord Truro in the Court below, and states that, but for those remarks, he should have thought that the principle contended for by the plaintiffs was "a matter beyond doubt," we think that we ought to consider the law on this subject as settled, at least until it is questioned in a court of error.

It seems to be the result of the authorities that a covenant not to sue, qualified by a reserve of the remedies against sureties, is to allow the surety to retain all his remedies over against the principal debtor; and that the covenant not to sue is to operate only so far as the rights of the surety may not be affected.

Probably many deeds of this nature are framed continually on the supposition that the law has been supposed to be settled in the manner stated in the Exchequer, since the time of Lord Eldon; and we think that, sitting as a court of co-ordinate jurisdiction with the Exchequer, we ought not to disturb the law stated by them in a solemn judgment to be clearly settled.

Our judgment, therefore, upon the demurrer in the present case is in favor of the plaintiff. *Judgment for the plaintiff.*[2]

[1] 4 H. L. Ca. 1037.

[2] *Ex parte* Gifford, 6 Ves. 805; Maltby *v.* Carstairs, 7 B. & C. 735; Thompson *v.* Lack, 3 C. B. 540; Wyke *v.* Rogers, 1 D. M. & G. 408; Close *v.* Close, 4 D. M. & G. 176; Green *v.* Wynn, 4 Ch. 204; Nevill's case, 6 Ch. 43; Bateson *v.* Gosling, L. R. 7 C. P. 9; Muir *v.* Crawford, L. R. 2 Sc. Ap. 456 (explaining Webb *v.* Hewitt, 3 K. & J. 438); Rockville Bank *v.* Holt, 58 Conn. 526; Mueller *v.* Dobschuetz, 89 Ill. 176; Boatmen's Bank *v.* Johnson, 24 Mo. Ap. 316; Kirby *v.* Turner, Hopk. Ch. 309; Lysaght *v.* Phillips, 5 Duer, 106. (But see Farmers' Bank *v.* Blair, 44 Barb. 641; Stirewalt *v.* Martin, 84 N. Ca. 4), *Accord.*

In Nevill's Case, *supra*, Sir G. Mellish, L. J., said (p. 47): "The reason why a simple release of the principal debtor discharges the surety is, that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the principal debtor."

The release of the principal by the creditor will not exonerate the surety, if the latter, either before or at the time of such release, agrees to continue liable. Smith *v.* Winter, 4 M. & W. 519; Union Bank *v.* Beech, 3 H. & C. 672; *Ex parte* Harvey, 23 L. J. Bank, 26; Davidson *v.* Cooper, 8 M. & W. 755; Rockville Bank *v.* Holt, 58 Conn. 526; Osgood *v.* Miller, 67 Me. 174; Parsons *v.* Gloucester Bank, 10 Pick. 533; Hutchinson *v.* Wright, 61 N. H. 108; Bruen *v.* Marquand, 17 Johns. 58; Wright *v.* Storrs, 6 Bosw. 600. See however, Eggemann *v.* Henschen, 56 Mo. 123; Broadway Bank *v.* Schmucker, 7 Mo. Ap. 171. — ED.

JONES, RESPONDENT, v. WARD, APPELLANT.

IN THE SUPREME COURT, WISCONSIN, FEBRUARY 28, 1888.

[*Reported in* 71 *Wisconsin Reports*, 152.]

LYON, J.[1] Briefly stated, the case, so far as there is any controversy, is as follows: The defendant became surety for Cook's debt to the plaintiff, and Cook indemnified him by executing to him a chattel mortgage on certain property. The plaintiff released Cook from liability for such debt, without the consent of the defendant. Afterwards, defendant sold his security to McArthur, without the consent of the plaintiff, for the consideration (as the Circuit Court found) of $475.

The only question in the case is, Did the release of Cook also release the defendant, his surety? The general rule undoubtedly is that the release of the principal debtor, without the consent of the surety, releases the surety. But if the surety is fully indemnified against loss by reason of having become such, a release of the principal without payment of the debt does not release the surety. This is the rule laid down in Fay *v.* Tower,[2] as applied to a case in which an unauthorized extension of credit had been given to the principal.[3] Manifestly, the same rule should be applied where the surety is absolutely released from the debt. The rule is founded upon a very plain principle of justice. To illustrate: A becomes security for B to C for the payment of $1,000. B puts property into the hands of A, worth $1,000, to indemnify him against loss because of the obligation thus assumed by him. C releases B, the principal debtor, from all liability on account of the debt, but receives no payment thereon. A, the surety, then sells the pledged property for $1,000 and retains the proceeds. It is entirely reasonable and just that, notwithstanding the release of the principal debtor, C should have his remedy against the surety for the amount realized by him in the sale of the pledged property. Such, we think, is the law. It seems to us that we have here just such a case.

BY THE COURT. The judgment of the Circuit Court is affirmed.[4]

[1] Only the opinion of the Court is given. — ED.

[2] 58 Wis. 286.

[3] Chilton *v.* Robbins, 4 Ala. 223; Home Bank *v.* Waterman, 134 Ill. 461 (*semble*); Crim *v.* Fleming, 101 Ind. 154; Keinhaus *v.* Generous, 25 Oh. St. 667; Smith *v.* Steele, 25 Vt. 427, *Accord*. — ED.

[4] Moore *v.* Paine, 12 Wend. 123, *Accord*. — ED.

ENGLISH v. DARLEY.

IN THE COMMON PLEAS, JANUARY 27, 1800.

[*Reported in 2 Bosanquet & Puller*, 61.]

ASSUMPSIT by the indorsee of a bill of exchange against the indorser

LORD ELDON, Ch. J., before whom the cause was tried at the Westminster sittings after last Michaelmas Term, nonsuited the plaintiff under the following circumstances: Payment of the bill being refused when due, the plaintiff commenced actions against the present defendant and the acceptor, and having sued the latter to judgment, took out *execution* thereon; but although the acceptor had sufficient to answer the execution, the plaintiff at his instance received £100 in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together with interest and costs, excepting only a nominal sum, with a view to enable him, the plaintiff, to support actions against the other parties to the bill.

Shepherd and *Lens*, Sergts., now moved for a new trial.[1]

LORD ELDON, Ch. J. It is very clear that the holder of a bill may at his election sue any or all the parties to it, and that if they all become bankrupt, he may prove against the estates of all, unless he receive part of the debt from any one. And although the debt be reduced from time to time by dividends, no part of the proof shall be expunged under any of the commissions till 20*s.* in the pound have been received. As long as the holder is passive, all his remedies remain; and if any of the parties be discharged by the act of law, as by an insolvent debtor's act, that operation of law shall not prejudice the holder. With respect to Hayling *v.* Mulhall,[2] it may be observed that the marginal abstract of that case is incorrect; for it appears from the report that the person first sued was a subsequent indorser: had the plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser. If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Ex parte* Smith,[3] Lord Thurlow, after consulting with all the judges, was of opinion, that the holder of a bill by entering into a composition with the acceptor discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptor's liability being varied by the act of the holder. We all remember the case where, Mr. Richard Burke being co-surety for an annuity, the grantee gave time to the

[1] The argument in support of the motion is omitted. — ED.

[2] 2 Bl. 1235.

[3] Co. B. L. 168, 172. Ed. 4.

Jones v Island

Δ was surety for one Cook, who had executed a chattel mortgage to him to secure him. Π then released Cook without knowledge of Δ, & then Δ sold security to McQ. without Π's consent. Π now tries to hold Δ.

Π get judgment for Π. Surety is indemnified against loss, there is no objection to holding liable.

Endorsee of bill vs endorser. Π sued acceptor & got judgment. On execution he got part payment, & took a bond & warrant of attorney for balance & now sues Δ, who apparently was a surety endorser.

Π get judgment for Δ. Holder in due course can recover against parties prior to him, but one who has given time to acceptor & thus discharged surety loses.

principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the co-surety, because he must by so doing enforce a payment from the principal contrary to the agreement. Here the plaintiff, having taken a new security from the acceptor, has discharged the defendant.

HEATH and ROOKE, Js., were of the same opinion.

Shepherd and *Lens* took nothing by their motion.[1]

SAMUELL v. HOWARTH.

IN CHANCERY, BEFORE LORD ELDON, C., AUGUST 7, 1817.

[*Reported in* 3 *Merivale*, 272.]

BILL in equity by a guarantor against the creditor, praying that the guaranty might be delivered up to be cancelled, and that the creditor be restrained from proceeding at law, inasmuch as he had given time to the principal debtor.[2]

THE LORD CHANCELLOR. The guaranty given in this case is general in its terms, and must be construed, according to its legal effect, in favor of the surety.

The liabilities of sureties are governed by principles which have been long settled in equity and are now adopted in courts of law. I say, *now*, because the Court of Common Pleas formerly held a different doctrine.[3] But at present it is firmly established that the same principles which have been held to discharge the surety in equity will

[1] Many cases in accord with English *v.* Darley are cited in 2 Ames, Cases on Bills and Notes, 120, n. 2. To these may be added the following: Anderson *v.* George, Selw. N. P. (8th ed.) 389; *Ex parte* Wilson, 11 Ves. 410; Isaac *v.* Daniel, 8 Q. B. 500; Daggett *v.* Whiting, 35 Conn. 366; Randolph *v.* Fleming, 59 Ga. 776; First Bank *v.* Day, 64 Iowa, 118; Eggerman *v.* Henschner, 56 Mo. 123; Place *v.* McIlvaine, 38 N. Y. 96; Scoville *v.* Landon, 50 N. Y. 686; Siebeneck *v.* Anchor Bank, 111 Pa. 187; Hamilton *v.* Prouty, 50 Wis. 592.

In Devore *v.* Mundy, 4 Strob. 15, the giving of time to the principal by the holder of a note, it was held, was no defence for the surety in an action brought by a subsequent transferee of that holder, and that, too, although the subsequent transfer was after the maturity of the note. — ED.

[2] This statement of the case has been greatly abridged, and the arguments of counsel are omitted. — ED.

[3] "This defence is borrowed from a court of equity: There, if day of payment be given to the debtor, the sureties are discharged. It is the equitable right of sureties to come into a court of equity and demand to sue in the name of the creditor. Now if the creditor have given time to his debtor, the surety cannot sue him," per Gibbs, C. J., in Orme *v.* Young, Holt N. P. 86. See, also, Melvill *v.* Glendinning, 7 Taunt. 126; Hawkshaw *v.* Parkins, 2 Sw. 539, 544, 545, 546. — ED.

operate to discharge him also at law.[1] However, as the same relief is to be obtained in both, a court of equity will not send a party who is suing here to a court of law for the discharge to which he is equally entitled in this place.

The rule is this: That, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal — not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the *same* remedy against the principal as he would have had under the original contract.

Now, in the present case, the creditor has been supplying goods to the principal debtor, from time to time, upon a certain credit, the extent of which, not being expressly stipulated between the parties, I must take to be credit given according to the usual course of trade. The surety says, I will be answerable for the amount of such goods as you shall furnish during the period from the 2d of April, 1814, to the 2d of April, 1815. It is impossible for me to hold that this is an engagement by which he (the surety) has rendered himself liable for an indefinite time beyond the expiration of the period limited for the delivery of the goods. It cannot be supposed that the plaintiff meant he should continue liable, after the 2d of April, 1815, so long as the defendant might choose to renew the bills of the principal debtor. You cannot contend in support of such an extravagant proposition. It has been truly stated that the renewal of these bills might have been for the benefit of the surety; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not, for his benefit. The creditor has no right — it is against the faith of his contract — to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety. *Injunction continued.*

[1] At the time LORD ELDON made this statement there were singularly few reported cases in which a surety had defeated an action at law by showing that the creditor had agreed to give time to the principal; and these few were all cases in which a subsequent party to a bill or note relied on the giving of time to a prior party. English *v.* Darley (1800), *supra;* Smith *v.* Knox (1800), 3 Esp. 46; Gould *v.* Robson (1807), 8 East, 576; Claridee *v.* Dalton (1815), 4 M. & Sel. 232.

But LORD ELDON'S statement has been generally recognized to be correct as to all cases where the suretyship is disclosed by the form of the contract. Combe *v.* Wolf, 8 Bing. 156; Howell *v.* Jones, 1 C. M. & R. 97. For the American decisions, which are legion, the learned reader is referred to 24 Am. & Eng. Encycl. of Law, 822, where the cases are arranged by States.

GIVING TIME WITH RESERVATION OF RIGHTS AGAINST SURETY. A creditor's agreement with the principal for forbearance, either temporary or perpetual, will not discharge the surety, if the creditor at the time of the agreement, and, as a part of it, reserves his rights against the surety. Price *v.* Barker, *supra*, 147, 150, n. 2; cases cited

Samuel v Pearsall

Δ delivered goods to principal & π agreed as surety to be answerable for amt for one year x thereafter Δ then renewed principal bill & is now suing π at law x π asks for an injunction against action at law, & also that Δ give up guaranty,

[illegible] could have relief at law but [illegible] sue on bond, they can in equity but [illegible] [illegible] [illegible]

Haney v Prendergrass

Δ executed d surety bond, along with principals, conditioned for payment of certain money. Δ pleaded that Pl's had given time to principals by K of, & had taken warrants of attorney. demurrer

Pl sustained demurrer. Parol agreement has cert effect on principal's liability which remains as it is to Pl even as respected in equity, but not at law. Ct of law cant take cognizance of this agreement.

DAVEY AND OTHERS v. PRENDERGRASS.

IN THE KING'S BENCH, NOVEMBER 5, 1821.

[*Reported in* 5 *Barnewall & Alderson*, 187.]

DECLARATION in debt on a surety bond, executed by the defendants, conditioned for the payment within one month after demand of such balance, not exceeding the sum of £500 as upon the settlement of accounts between the plaintiffs and Samuel Prendergrass and James Peter Prendergrass, should appear to be due from the latter to the former for coals, to be delivered by them to the said S. and J. P. Prendergrass. Breach, non-payment of the said sum after demand. The defendants craved oyer of the bond, and pleaded, first, *non est factum*, and second, a special plea in bar, that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal debtors to pay by instalments, and had taken a warrant of attorney to pay, by monthly instalments of £100 each, a balance of £1,099 9*s*., found to be due from the latter to the former, upon an adjustment of accounts for coals sold and delivered, with a power of issuing execution, in case of default of payment of any one instalment when due. To this last plea there was a demurrer and joinder in demurrer.

W. H. Maule, for the plaintiffs.

Chitty, contra.[1]

ABBOTT, C. J. Looking at the nature of the security in this case, it is impossible to say, that the sureties sustained any prejudice by what has taken place, for, if the first £100 was not paid, immediate execution might have issued, and it could not have been set aside. The ground, however, of my opinion in this case is, that general rule of the common law which requires that the obligation created by an instrument under seal shall be discharged by force of an instrument of equal validity. The operation of that rule is, indeed, sometimes such as to make it imperative upon a court of equity to interpose and grant relief; but it by no means follows, that the rule of law is to be broken

in 2 Ames, Cases on Bills & Notes, 120, n. 2; Kearsley *v.* Cole, 16 M. & W. 128; Owen *v.* Homan, 4 H. L. C. 997; Wyke *v.* Rogers, 1 D. M. & G. 408; Boaler *v.* Mayor, 19 C. B. N. S. 76; Jones *v.* Whitaker, 57 L. T. Rep. 216; Dupee *v.* Blake, 148 Ill. 465; First Bank *v.* McKenny, 67 Me. 272; Sohier *v.* Loring, 6 Cush. 537; Kenworthy *v.* Sawyer, 125 Mass. 28; Rucker *v.* Robinson, 38 Mo. 154; Morgan *v.* Smith, 70 N. Y. 537; Nat. Bank *v.* Bigler, 83 N. Y. 51; Bank *v.* Lineberger, 83 N. Ca. 454.

In Hutchins *v.* Nichols, 10 Cush. 299, the creditor agreed with the principal never to sue him, and not to proceed against the surety for nine months. This agreement was held not to discharge the surety, but to suspend the creditor's remedy for nine months. — ED.

COMPULSORY GIVING OF TIME. If the creditor is compelled to refrain from proceeding against the principal in consequence of an injunction obtained by the latter, the surety is not discharged. Hodges *v.* Gewin, 6 Ala. 478.

[1] The arguments of counsel and the concurring opinions of HOLROYD and BEST, JJ., are omitted. — ED.

down, because a court having jurisdiction of another kind will interpose where there is a particular case, in which the rule of law may found to operate harshly. There is great objection to a court of la taking upon itself to act as a court of equity, because they have no the means of doing that full and ample justice which the particular case may require. We ought not, therefore, to interpose in a matter which seems peculiarly to belong to the jurisdiction of a court of equity.[1] If a parol agreement is entered into to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond conditioned for payment of money at a certain day, it will not prevent the party from proceeding at law immediately, whatever the consideration for the delay may be. And if that be so, how can the giving of time to a third person by such an agreement, prevent the obligee of the bond from proceeding at law against the surety? There may indeed be such a consideration for the agreement as may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law. But a parol agreement of this nature can never operate to control the obligation of this bond in a court of law. The decisions which have taken place in the courts of equity in cases of this nature, have always, as I understand them, proceeded on the notion that at law the thing prayed for could not be done. Bills of exchange stand upon a very different footing: there the law merchant operates, and the courts of law decide upon them with reference to that law. Guaranties for the payment of debts are not in general instruments under seal, and there is no strict technical rule which, as to them, prevents a court of law from looking to the real justice of the case. The cases of bail and replevin bonds are provided for by acts of parliament giving to the court an authority over them. But, in both these cases, the jurisdiction is exercised always upon special application founded upon affidavits and not upon plea. A recognizance of bail stands upon a different ground from bail bonds as to the jurisdiction of the court. There the jurisdiction is not founded upon statute, but upon a general authority in the court to see that an improper use is not made of its own records. Therefore, in that case, as well as in the case of bail to the action, and of bail to the sheriff, if the Court sees that an improper use is attempted to be made of the security which the party has given, it immediately interferes. And that also is always done upon special application to the Court, upon affidavits setting forth all the circumstances of the case. In the case of Bulteel *v.* Jarrold in the House of Lords, which has been referred to, in which an attempt was made

[1] The doctrine that an agreement to give time to the principal discharges the surety in equity seems to be a comparatively modern notion. The editor has not discovered any earlier instances of the application of the doctrine than Lord Thurlow's decision in 1789, in the case of Nisbet *v.* Smith, 2 Bro. C. C. 579, which was followed by Rees *v.* Berrington (1795), 2 Ves. Jr. 540; Boultbee *v.* Stubbs (1810), 18 Ves. 20; Bowmaker *v.* Moore (1816), 3 Price, 214; Eyre *v.* Bartrop (1818), 3 Mad. 221. In all of the cases just cited the surety was a specialty obligor. — ED.

to put the matter on the record by way of plea, it was held, that it was no bar to the action. So in this case, which appears to be the first of the kind brought before this Court, although similar cases must have occurred very frequently, I am of opinion that we, deciding on legal principles, are bound to say, that this plea is no answer to the plaintiff's action. There must, therefore, be judgment for the plaintiff. *Judgment for the plaintiffs.*[1]

FENTUM *v.* POCOCK AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 16, 1813.

[*Reported in* 5 *Taunton*, 192.]

THIS was an action brought by the indorsee of a bill of exchange against the acceptor, and was tried before LORD CHIEF-JUSTICE MANSFIELD, at the sittings at Westminster after last Easter Term, when a verdict was found for the plaintiff with £80 damages, with liberty to the defendant to move to enter a nonsuit, on the ground that the plaintiff had discharged the defendant, by having accepted a *cognovit*, payable by instalments, from the drawer.

The bill, as appeared on the trial, had been accepted for the accommodation of the drawer, payable at Messrs. Davison & Co.'s., Pall Mall, who refused payment, saying they knew nothing of Pocock & Son. The plaintiff had given a valuable consideration for it, and knew nothing of its being an accommodation bill till after it became due.

Mr. Sergt. Shepherd in Trin. Term obtained a rule *nisi* on the above ground.

Mr. Sergt. Marshall now showed cause against the rule.[2]

MANSFIELD, C. J. No doubt, if the defendant can succeed in establishing the principle that we must so subvert and pervert the situation of the parties as to make the acceptor merely a surety, and the drawer the principal, the consequence contended for must follow. This case of Laxton *v.* Peat certainly is the first in which it was ever supposed that the acceptor of a bill of exchange was not the first person and the

[1] Bulteel *v.* Jarrold, 8 Price, 467; Ashbee *v.* Pidduck, 1 M. & W. 564; Parker *v.* Watson, 8 Ex. 404; Sprigg *v.* Mt. Pleasant Bank, 10 Pet. 257; U. S. *v.* Howell, 4 Wash. C. C. 620; Locke *v.* U. S., 3 Mass. 446; Wittmer *v.* Ellison, 72 Ill. 301; Tate *v.* Wymond, 7 Blackf. 240; Lewis *v.* Harbin, 5 B. Mon. 564; Pintard *v.* Davis, Spencer, 205; Shaw *v.* McFarlane, 1 Ired. 216; Holt *v.* Bodey, 18 Pa. 207; Dozier *v.* Lee, 7 Humph. 520; Burke *v.* Cruger, 8 Tex. 66; Steptoe *v.* Harvey, 7 Leigh, 501; Sayre *v.* King, 17 W. Va. 562, *Accord.*

See also *supra*, 140, n. 5. — ED.

[2] The statement of the case is taken from the report in Marshall, 14. The arguments of counsel, and the concurring opinions of HEATH and CHAMBRE, JJ., are omitted. — ED.

last person compellable to pay that bill to the holder of it, and that anything could discharge the acceptor, except payment, or a release; and I never before knew that there was any difference between an acceptance given for accommodation, and an acceptance for value. When I first saw that case in Campbell, I was in the same state as Mr. Justice Gibbs, and doubted a great deal whether it could be law. The case of Collott *v.* Haigh must be considered, not as a separate decision, but as resting on the authority of the former. It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point which comes before him at *nisi prius;* and whoever looks through Campbell's Reports will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which came before that noble and learned judge, not that there are mistakes, but that he is in by far the most of the causes so wonderfully right, beyond the proportion of any other judges. But upon this case we think that we are bound to differ from him, and to hold that it is impossible for us to consider the acceptor of an accommodation bill in the light of a surety for the payment by the drawer, and that we cannot therefore say that he is discharged by the indulgence shown to the drawer. Certainly the paying respect to accommodation bills is not what one would wish to do, seeing the mischiefs arising from them. One might find here a very important distinction between this case and the case decided by Lord Ellenborough; namely, that here the person taking the bill did not, at the time when he took it, know that it was an accommodation bill; and if he did not then know it, what does it signify what came to his knowledge afterwards, if he took the bill for a valuable consideration? But it is better not to rest this case upon that foundation, for, as it appears to me, if the holder had known in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference: for he who accepts a bill, whether for value or to serve a friend, makes himself in all events liable, as acceptor, and nothing can discharge him but payment or release. The case before Gibbs, J., has shaken this decision in Laxton *v.* Peat, and we think rightly; the case cited of English *v.* Darley is not applicable, where the giving time to an acceptor was held to be a discharge of an indorser, who stands only in the situation of a surety for the first. The rule, therefore, which has been obtained for setting aside the verdict and entering a nonsuit must be discharged.

Rule discharged.[1]

[1] Numerous cases in accord with Fentum *v.* Pocock are cited in 2 Ames, Cases on Bills and Notes, 16, n. 1. To these may be added Bank *v.* Thomas, 11 Up. Can. C. P. 515; Bank *v.* Brown, 3 Pugs. & B. 106; Diversy *v.* Moor, 22 Ill. 330; Stephens *v.* Monongahela Bank, 88 Pa. 157; Fourth Bank *v.* Frazier, 9 Phila. 213.

But see *contra*, Laxton *v.* Peat, 2 Camp. 185; *Ex parte* Glendinning, Buck, 517; Hall *v.* Capital Bank, 71 Ga. 715; Lacy *v.* Lofton, 26 Ind. 324 (overruling Gordon *v.* Southern Bank, 19 Ind. 192); Adle *v.* Metoyer, 1 La. An. 254; Canadian Bank *v* Coumbe, 47 Mich. 358; Meggatt *v.* Baum, 57 Miss. 22. — Ed.

Fentum v Pocock

Indorsee v acceptor. Δ accepted bill for accommodation of drawer. It was not heard when due, & then Π accepted a composition from drawer payable in instalments. He now sues acceptor.

It gave judgment for Π. Δ is absolutely bound on the bill by his mere relation to accommodation is not disputed. The fact that Π consented to a security for the drawer

Pooley v Harradine

Payee v maker of note, Δ pleaded that he was accomodation maker, note was delivered to Π on express agreement that he was to be liable only as surety. Plea alleged that Π had given time to principal for payment of note, demurrer

at circ- ruled demurrer & gave judgment for Δ, defence of surety arises, not from contract, but from inequitable conduct, & it can make no difference how Π got his knowledge on which Δ's inequitable conduct is based, whether knowledge, he could give time & retain hold Δ

RICHARD POOLEY *v.* WILLIAM THANG HARRADINE.

IN THE QUEEN'S BENCH, FEBRUARY 24, 1857.

[*Reported in 7 Ellis & Blackburn*, 431.]

COLERIDGE, J.,[1] in this vacation (February 24th), delivered judgment.

This was an action by the payee against the maker of three promissory notes. The defendant pleaded, by way of equitable defence, that the notes were made by him jointly with John Harradine and Thomas Harradine, and that he made them at the request and for the accommodation of John Harradine, as the surety only of John Harradine, and to secure a debt due from John Harradine solely to the plaintiff, and without value or consideration; and that the notes were delivered to the plaintiff, and accepted by him from the defendant, upon an express agreement between them that the defendant should be liable thereon as surety only for the said John Harradine; and that the plaintiff, at the time the notes were made, had notice and knowledge of the same having been so made by him as such surety. The plea then stated that the plaintiff, whilst holder of the notes, without the knowledge or consent of the defendant, for a good and valuable consideration, agreed to give and did give the said John Harradine time for the payment of the notes, and forbore to enforce them; and that he could and might, had he not given such time, have obtained payment from the said John Harradine. The plaintiff having demurred to this plea, we have to determine whether the facts stated in the plea amount to an equitable defence.

At law it seems to have been thought that the discharge of the surety by such giving time to the principal was founded on a variation of the contract between the creditor and the surety; and if that be so, it necessarily follows (the rule of evidence as to not varying a written contract by parol being the same at law and in equity) that no parol contemporaneous agreement could be allowed to vary the contract in the case of a written instrument. Probably the cases at law would be too strong to make it proper for us, not sitting in a court of error, to decide contrary to the current of authorities on this subject, were we disposed so to do, if the case now before us were that of a legal plea. It is important, however, for the decision of this case, to consider whether, in equity, the doctrine of the discharge of the surety by time given to the principal debtor is confined to cases where the relation of suretyship appears on the original contract between the creditor, the principal, and the alleged surety, or whether an equity does not arise from the relation of the co-obligors or co-promisors *inter se*, and on the knowledge by the creditor of the existence of that relation. . . .[2]

Whether that relation must, according to some of the expressions

[1] Only the opinion of the Court is given. — ED.

[2] The Court here discussed Hollier *v.* Eyre, 9 Cl. & F. 1; Strong *v.* Foster, 17 C. B. 201; and Davies *v.* Stainbank, 6 D. M. & G. 679. — ED.

used by learned judges, have been known to the principal at the time of the original transaction is immaterial with reference to the plea now before us, as it contains an allegation of knowledge by the creditor at the time of the making and receipt of the notes; but we may remark that there does not appear to have been such knowledge at the date of the original transaction in the case of Stainbank *v.* Davies;[1] and if the equity does not depend on any contract with the creditor, but on its being unequitable in him knowingly to prejudice the rights of the surety against the principal, the equity would seem to extend to the case of the principal knowing the existence of the relation of suretyship only at the time of his dealing in such a manner with the principal debtor as to prejudice the rights of the surety. We believe the doctrine laid down in the cases we have cited from the courts of equity is well warranted by the authorities in equity, many of which are collected in the report of the case of Strong *v.* Foster;[2] and we think it quite consistent with the principle on which the interfering with the rights of the surety against his principal are founded. The surety, we apprehend, on paying the debt, has always a right to require the creditor to sue, or allow him to sue the principal in his (the creditor's) name; and if, to use the words of my brother Williams in Strong *v.* Foster,[3] "the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety." He has, on this supposition, knowingly and wrongfully interfered with the position and rights of the surety. Now, does this right of placing himself, as it is said, in the shoes of the creditor depend on a prior contract between the creditor and surety, or on an implied duty of the creditor not to injure the surety's rights when he knows of the relation subsisting between him and his principal? We do not see that by the doctrine asserted in courts of equity the primary liability is at all altered. In truth, the defence, either at law or in equity, does not arise by any alteration of the original contract, which indeed it assumes and relies on in its original terms, but that the creditor cannot fairly or equitably sue the surety where, knowing of the existence of the relation of suretyship, he has voluntarily tied up his hands from proceeding against the principal. We agree that no defence could be set up by parol which should depend on altering the rights of the creditor on the contract as between himself and the alleged surety as a primary debtor; as, for instance, by making him liable only on default of the principal, or after a request to him; but in truth the surety, in most of the cases where the suretyship is apparent on the deed or written instrument, contracts, not as surety collaterally, but as a principal debtor or covenantor. His being named as surety may operate as proof of notice or knowledge; but his contract is generally that of primary liability. Thus, in the case of common money bonds, the liability is not collateral, but primary, though in bonds and contracts to indemnify,

[1] 6 D. M. & G. 679. [2] 17 Com. B. 201. [3] 17 Com. B. 201, 269.

it is generally collateral. In the case of money bonds, where the party is sued as surety, there is no contract as between the surety, obligor, and the obligee of any kind but that which imposes a primary liability; and it may well be argued that it is immaterial whether the knowledge proceeds from a recital in the instrument or from extraneous facts. We conceive that equity would relieve in the case of a co-obligor in a common money bond being made out to be a surety by extrinsic evidence only, if time were given in such a way as to discharge a surety in the ordinary case of principal and surety, when the relation of suretyship appears on the face of the instrument. It may be worth remarking that in Laxton v. Peat,[1] one of the earliest cases on this subject, Lord Ellenborough seems to have proceeded on the ground of the plaintiff having notice of the suretyship when he gave the time, as the plaintiff was the indorsee of the bill, and there does not appear to have been evidence of any agreement between him and the surety. The plaintiff (the indorsee) gave value, but had notice of the circumstances of the original formation of the bill; and his giving time, with such knowledge, discharged the surety, although the suretyship, as regarded the indorsee, depended on no agreement with him.

In the more recent cases at law, however, the rule in question has apparently been treated as arising out of the original contract with the creditor; and if this was a plea of a legal defence, we should probably have felt bound by those authorities, and have left it to a court of error to consider the whole question, taking into their consideration whether the same rule in such matters ought not to exist in courts of law and equity, and to decide, if there be a difference, what the rule should be. As we are, however, called upon to deal with this case as if we were sitting in a court of equity, we think that we ought to decide it according to what we believe to be the doctrine in courts of equity. At the same time we shall not regret if this important subject should now, or on any future occasion, be reviewed in all its bearings by a court of error.

We give our judgment for the defendant on the present plea, on the ground that it appears to us sufficiently to state that the relation of principal and surety existed between the defendant and the principal debtor, *inter se*, and that the plaintiff had knowledge of that fact when the notes were made and received by him, and when he entered into a binding agreement to give time to the principal debtor.

Judgment for the defendant.[2]

[1] 2 Camp. 185.

[2] Taylor v. Burgess, 5 H. & N. 1; Greenough v. McClelland, 2 E. & E. 424; Mut. Assoc. v. Sudlow, 5 C. B. N. S. 449; Swire v. Redman, 1 Q. B. D. 536; Maingay v. Lewis, Ir. R. 5 C. L. 229, *Accord*. In Swire v. Redman, *supra*, Cockburn, C. J., said (p. 541): "The relation of principal and surety gives to the surety certain rights. Amongst others the surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare.

EWIN v. LANCASTER.

IN THE QUEEN'S BENCH, MAY 29, 1865.

[*Reported in* 6 *Best & Smith*, 571.]

COCKBURN, C. J.[1] The plaintiff is the holder of bills of exchange accepted by the defendant for the accommodation of Burtwell, the drawer, and after they became due he entered into an agreement with Burtwell, that if Burtwell would give him a mortgage security on real estate he, the holder, would cancel the bills and release all parties from liability upon them. That is the state of facts on the findings of the jury.[2] The third plea is not made out to the full extent; but in order that justice might be done I reserved power to the Court to amend it, if necessary; and, the Court having power to add a plea, I think such a plea might be put on the record as would establish a defence on equitable grounds. In Bailey *v.* Edwards[3] it was held that

Still, the surety has this right. And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety — in the immense majority of cases not damaging him to the extent even of a shilling — must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds. But though this seems — if it may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers — consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the legislature. And as it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and therefore had such rights, was not acquired till after the surety had become liable to the creditor."

In England, Maryland, and New Jersey, where a principal and surety are co-makers of a note, and the holder, with knowledge of the suretyship, agrees to give time to the principal, the surety has no common-law defence to an action on the note. Manley *v.* Boycott, 2 E. & B. 46; Yates *v.* Donaldson, 5 Md. 389; Anthony *v.* Fritts, 45 N. J. 1.

But generally in this country the surety's defence under such circumstances is allowed at law as well as in equity. See, in addition to the numerous citations in 2 Ames, Cases on Bills and Notes, 82, n. 2, the following cases to the same effect: Vary *v.* Norton, 6 F. R. 808; Scott *v.* Scruggs, 60 F. R. 721; Capital Bank *v.* Real, 62 Cal. 419; Buck *v.* Smiley, 64 Ind. 431; Arms *v.* Beitman, 73 Ind. 85 (*semble*); Kales *v.* Hise, 79 Ind. 301; Sample *v.* Cochran, 84 Ind. 594; Corielle *v.* Allen, 13 Iowa, 289; Lanman *v.* Nichols, 15 Iowa, 161; Piper *v.* Newcomer, 25 Iowa, 221; Wendling *v.* Taylor, 57 Iowa, 354; Lambert *v.* Shefler, 71 Iowa, 463; Calloway *v.* Snapp, 78 Ky. 561; Andrews *v.* Marrett, 58 Me. 539; Guild *v.* Butler, 127 Mass. 386; Gano *v.* Heath, 36 Mich. 441 (*semble*); German Association *v.* Helmrick, 57 Mo. 100; Stillwell *v.* Laron, 69 Mo. 539; Welfare *v.* Thompson, 83 N. Ca. 276; Calvert *v.* Good, 95 Pa. 65; First Bank *v.* Skidmore, Tex. Ap. '95, 30 S. W. R. 564; Irvine *v.* Adams, 48 Wis. 468; Moulton *v.* Posten, 52 Wis. 169. — ED.

[1] Only the opinions of the Court are given. — ED.

[2] The jury found that the plaintiff knew, when he took the mortgage security, that the defendant was an accommodation acceptor. — ED.

[3] 4 B. & S. 761.

the giving time to a prior indorser of a bill of exchange discharged an accommodation acceptor; the principle on which that decision was founded being, that the parties to an accommodation acceptance stand in the relation of principal and surety. Where one is surety for another and the creditor gives time to the principal debtor the surety is discharged; for if the surety pays the debt he is entitled to sue the debtor in the name of the creditor in order to recover back from him the money he has paid. In the present instance, if the accommodation acceptor had gone to the holder of the bills, and in order to get possession of them had proposed to him to pay them with the view to enforce in the name of the creditor the liability of the drawer to repay him what he had so paid, the holder could not have given them up to him; for he had entered into an agreement to cancel them. And as soon as he put it out of his power to deliver up the bills to the acceptor on payment of their amount, he deprived the accommodation acceptor of his right as surety to recover from the principal debtor. On that ground, as well as on the authority of Bailey *v.* Edwards,[1] I am of opinion that the plaintiff has discharged the surety, and therefore the rule should be made absolute.

CROMPTON, J. Originally the cases at law were extremely strong that the position of parties to a bill of exchange or promissory note could not be reversed by making the party who appeared on the face of the instrument to be the principal debtor surety for the other. They proceeded on the principle that parol evidence is not allowed to alter a written contract: that principle is a sound one, and has governed many cases in Courts of law. But cases in equity establish that when one or both of two parties to an instrument are primarily liable, as in the instance of a common bond where several join as obligors, and the creditor may sue any one of them at any time, it is competent for him to show that the relation of principal and surety exists between the parties. Lord Cottenham, in Hollier *v.* Eyre,[2] referred to in Pooley *v.* Harradine, explained that the doctrine on which the courts of equity proceed arose from its being inequitable that the creditor should prejudice the rights of the surety against the principal. In Strong *v.* Foster,[3] which was after pleas on equitable grounds had been introduced, the evidence failed to support the equitable defence, and it was not necessary to pronounce an opinion on the validity of it. In Pooley *v.* Harradine, this Court upheld a plea on equitable grounds, which stated that the defendant made the note jointly with A as surety only for him, of which the plaintiff had notice at the time, and that the plaintiff gave time to A without the defendant's knowledge. That decision was adopted by the Court of Exchequer in Taylor *v.* Burgess,[4] and was held to be law by the Exchequer Chamber in Greenough *v.* McClelland.[5] But Pooley *v.* Harradine left one matter in doubt, viz.,

[1] 4 B. & S. 761.
[2] 9 Cl. & F. 1, 45.
[3] 17 C. B. 201.
[4] 5 H. & N. 1.
[5] 2 E. & E. 424, 429.

whether the creditor must have had notice of the suretyship at the time of taking the notes, or whether notice at the time of the dealing alleged to amount to a discharge of the surety was sufficient. That case came before this Court in Bailey v. Edwards,[1] which is very analogous to the present; and the law accurately laid down by my brother Blackburn in that case, applies here. There the plaintiffs, when they executed the deed by which time was given, had notice that the bill was accepted for the accommodation of their debtor; and that is the time to be looked at, because it is the time when the equity arises. It is clear that a creditor is not bound to sue either the principal or the surety; no delay in suing the surety will prejudice him, but he must not make a binding agreement by which he ties up his hands from suing the principal; if he does so the surety is discharged, on the principle explained by Williams, J., in Strong v. Foster.[2] Here the plaintiff made a contract with the principal upon good consideration to give up the bills to be cancelled. Whether that is a waiver of the right of action against the surety may be doubtful; for a waiver can only be to the party himself who relies upon it. But by that contract the plaintiff for a good consideration tied up his hands from suing the principal debtor. It may be shown by parol evidence that in the transaction between the creditor and his debtors, according to truth and for the purposes of equity, one of the debtors was surety for the other; and then the creditor is within the rule by which, if he gives time to the principal debtor, the surety is discharged.

SHEE, J., concurred. *Rule absolute.*[3]

ROUSE v. THE BRADFORD BANKING COMPANY.

IN THE HOUSE OF LORDS, JULY 30, 1894.

[*Reported in* [1894] *Appeal Cases*, 586.]

LORD HERSCHELL, L. C.[4] My Lords, the appellant, who was the plaintiff in the action, was formerly in partnership with certain other persons carrying on business as worsted spinners under the firm of William Rouse & Co. The partnership between them was dissolved by a deed of the 17th of April, 1885. By that deed William Rouse was to cease to carry on the business, and the other members of the firm, John Frederick Rouse, Frank Rouse, and Herbert Rouse, were to continue to do so. By that deed also the debts of the firm were to be

[1] 4 B. & S. 761.

[2] 17 C. B. 201, 219.

[3] Davies v. Stainbank, 6 D. M. & G. 679; Bailey v. Edwards, 4 B. & S. 761; Oriental Corp. v. Overend, 7 Ch. 142, 348 (overruling *Ex parte* Graham, 5 D. M. & G. 356); Valley Bank v. Meyers, 17 N. B. R. 257; Westervelt v. Frech, 33 N. J. Eq. 451; Shelton v. Hurd, 7 R. I. 403, *Accord.* — ED.

[4] Only the opinions of the judges are given. — ED.

Ewin v Lancaster

Indorsee of bill vs acceptor × Δ accepted for accomodation of one B, the drawer × Then Δ found out that Δ was only a surety, × then he agreed to execute a release of all bills, & cancel the bills if B would execute a mortgage, which was done × Δ now tries to hold Δ ×

Against payment for Δ × It goes beyond [illegible]

Court of Bradford Co.

Π was a partner in a firm & was co-obligor on some notes owned by Δ, & he then retired from firm, notice was given to Δ, & new firm covenanted to indemnify Π from old debts. Action was brot to establish claim of Π to share in the Δ Co as free from any lien by reason of debts of partnership. Π claimed that there was an agreement by Δ with new partnership to give time on notes & that this discharged Π.

Ct gave judgment for Δ. If there are two joint principals, & time is given to creditor that one is surety, creditor can't sue surety during time given to principal without discharging surety. So if time was given to Π, Π would be discharged from liability on notes & could set up [illegible]

Ct thinks [illegible] no evidence of agreement to give time to Π, & [illegible] Π [illegible]

paid by the new partnership, who were to take over its assets, and they covenanted with William Rouse, the retiring partner, to indemnify him against those debts. The covenant contained a proviso to which I will call attention presently.

My Lords, at the time of the dissolution, amongst the debts owing was a debt of upwards of £50,000 to the Bradford Banking Company, in which the appellant was a shareholder. At the time when the new firm failed, some years afterwards, the debt had been reduced below £50,000, but a considerable amount was still owing to the bank, and this action having been brought to establish the appellant's claim to his shares free from any lien, the respondents sought by counter-claim to enforce their right to hold William Rouse's shares as security for the debt. The answer to this claim was that William Rouse had been discharged from all his liability to the bank by reason of transactions between the bank and the new firm. The case was put in this way: that upon the dissolution of the firm under the deed which I have mentioned, the continuing partners became as between themselves the principal debtors, and William Rouse merely a surety for them; and that inasmuch as the bank had notice of the deed of dissolution and its terms, it was brought to the knowledge of the bank that this was the relation of the parties after that date. Then it was said that the bank thus knowing that William Rouse had become surety only as between him and his former co-partners, gave time to the continuing members of the firm for the payment of the debt in question, and so discharged William Rouse. It was contended indeed alternatively, that there had been a novation, and that the bank had accepted the new firm as their debtors in place of the co-debtors who had previously been liable to them, and that, by this novation, William Rouse was discharged. That argument has not found favor with any of the learned judges before whom the case has come, and your Lordships have already intimated that, in your opinion, it cannot be supported.

My Lords, with regard to the question whether time was given so as to discharge the surety, the general principle of equity was not contested that where there is a contract with two persons, one as principal and the other as surety, and time is given to the principal without the assent of the surety, and without the rights against the surety being reserved, the right against the surety is extinguished; but it was said to be inapplicable to such a case as the present where those who as between themselves became principal and surety had been originally both of them principal debtors to the creditor.

On the other hand, it was contended that this made no difference and that the rule of equity was as applicable to a case where two having both been principal debtors, one afterwards became, with notice to the creditor, a surety, as it was to a case where the contract with the creditor was one of principal debtor and surety. Reliance was placed for this proposition upon the case of Oakeley v. Pasheller,[1] decided in this

[1] 4 Cl. & F. 207; 10 Bli. (N. S.) 548.

House. That case has been very much discussed, and inasmuch as I believe all your Lordships have formed a clear opinion upon the argument which has been addressed to you on that point, it is probably well to express it, although the decision in this House does not turn upon the conclusion arrived at with regard to Oakeley *v.* Pasheller.[1]

In Oakeley *v.* Pasheller,[1] Lord Lyndhurst, in delivering judgment, said this: "Now in consequence of an arrangement which took place between the representatives" (that is the representatives of the deceased partner) "and the new partnership" (in that case an additional partner was taken in when one of the partners died) "they stood in the character of sureties; and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability because it places him in a new situation and exposes him to risk and contingencies which he would not otherwise be liable to." The proposition is there laid down in terms quite unequivocal by Lord Lyndhurst affirming Lord Brougham as Lord Chancellor and the Master of the Rolls.

My Lords, it was suggested, in the case of Swire *v.* Redman,[2] that the judgment in Oakeley *v.* Pasheller[1] turned upon the fact that the creditor had been a party to an arrangement by which the representatives of the deceased partner were, as between him and them, to be sureties only. I cannot myself find any trace of such an arrangement as being the foundation, in any respect, of the judgment of Lord Lyndhurst.

In the case of Overend, Gurney & Co. *v.* Oriental Financial Corporation[3] before Lord Hatherley when Lord Chancellor, he referred somewhat elaborately to the facts in Oakeley *v.* Pasheller,[1] and he said: "There is really in substance no hardship; and that is one reason why I dwelt at some little length to show that it was not a doctrine which was at all shaken by the right of the creditor to preserve his remedies against the surety; and if there was any small hardship, they could have freed themselves from that hardship and all difficulty whatever. A person comes and tells them that since the debt was contracted circumstances have arisen by which he is in fact surety and the other debtor is the principal debtor. Thereupon all that they have to do is to give the principal debtor time and reserve their rights against the surety." It is quite clear, from the language used in the earlier part of the judgment, that Lord Hatherley considered he was really following the principle laid down in Oakeley *v.* Pasheller.[1] The case of Overend, Gurney & Co. *v.* Oriental Financial Corporation[3] was this: that two persons had appeared to the creditor, at the time the contract was entered into, to be both principal debtors, and he afterwards obtained notice of the fact that one of them was a surety only. It was held that when once he had received that notice he could not give time

[1] 10 Bli. (N. S.) 548, 590.
[2] 1 Q. B. D. 536.
[3] Law Rep. 7 Ch. 142; 41 L. J. (Ch.) 332, 336.

to the one who, as between themselves, was the principal debtor, without discharging the surety.

My Lords, that case came before this House on appeal from the decision of Lord Hatherley as Chancellor, and the judgment was affirmed. Lord Cairns said:[1] "My Lords, it appears to me that after the case which was referred to at the Bar, decided by your Lordship's House, of Oakeley *v.* Pasheller,[2] it is impossible to contend if after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply. That is a distinct and clear expression of opinion as to the limits and the grounds of decision in Oakeley *v.* Pasheller,[2] and it is in accordance with the view which I have myself formed of that case. And in this House, as I have said, the decision of Lord Hatherley was affirmed, and therefore the proposition was actually applied in a case where the two debtors had both been believed to be principal debtors by the creditor at the time the contract was entered into.

My Lords, I own I am quite unable to see any distinction, even if Oakeley *v.* Pasheller[2] did not exist, between that case in the House of Lords and the present. If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must equally be the case (for otherwise there would be a distinction, resting on no intelligible or solid basis), that where, although both are principal debtors at the time, one of them afterwards, as between himself and his co-debtor, becomes a surety, that one is discharged if time be given to the other. . . .[3]

Lord Watson. My Lords, when two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that, *inter se*, one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in Oakeley *v.* Pasheller,[4] and Overend, Gurney & Co. *v.* Oriental Corporation.[5]

Order appealed from affirmed and appeal dismissed with costs.[6]

[1] Law Rep. 7 H. L. at p. 360.

[2] 10 Bli. (N. S.) 548, 590.

[3] The Lord Chancellor here discussed the documentary evidence in the case, and concluded that there was in fact no binding agreement of the creditor to give time to those who had become the principal debtors. Lord Watson was inclined to take the same view on this point. — Ed.

[4] 10 Bli. (N. S.) 548.

[5] L. R. 7 H. L. 348.

Lord Ashbourne, Lord Macnaghten, and Lord Morris concurred. — Ed.

[6] Oakley *v.* Pasheller, 4 Cl. & F. 207, 10 Bligh, N. S. 548 s. c.; Oakford *v.* European Co., 1 H. & M. 182 (*semble*); Oriental Corp. *v.* Overend, L. R. 7 H. L. 348, 360,

SUSAN E. MURRAY and Others, Executors, Respondents, v. PHEBE MARSHALL, Appellant.

In the Court of Appeals, New York, February 8, 1884.

[*Reported in* 94 *New York Reports*, 611.]

Appeal from order of the General Term of the Supreme Court in the second judicial department, made December 12, 1882, which reversed a judgment in favor of defendant, entered upon a decision of the Court on trial without a jury.

This action was upon a bond executed by defendant to plaintiffs' testator. The answer averred, and the Court found in substance, that at the time the bond was executed, a mortgage was also executed by defendant to secure the payment thereof; that thereafter defendant sold and conveyed the mortgaged premises subject to said mortgage; that plaintiff's testator, in consideration of the payment to him by the grantee of $500 of the principal and of the interest due upon the bond and mortgage, executed and delivered to said grantee, without the knowledge or assent of defendant, an instrument under seal, extending the time of payment of the balance unpaid for three years, whereby the answer claimed, and the trial court found defendant was released and discharged from all liability.

Henry D. Birdsall, for appellant.

Josiah T. Marean, for respondents.[1]

per Lord Cairns; Wilson *v.* Lloyd, 16 Eq. 60; Vary *v.* Norton, 6 F. R. 808; Home Bank *v.* Waterman, 134 Ill. 461, 467; Williams *v.* Boyd, 75 Ind. 286 (*semble*); M'Taggart *v.* Dolan, 86 Ind. 314 (*semble*); (but see Fensler *v.* Prather, 43 Ind. 119); Smith *v.* Sheldon, 35 Mich. 42; Cornwell *v.* Megins, 39 Minn. 407 (*semble*); Patterson *v.* Camden, 25 Mo. 13 (*semble*); Millerd *v.* Thorn, 56 N. Y. 402; Colgrove *v.* Tallman, 67 N. Y. 95; Palmer *v.* Purdy, 83 N. Y. 144 (*semble*); Thurber *v.* Corbin, 51 Barb. 215 (*semble*); Morrison *v.* Perry, 11 Hun, 33 (*semble*); Dodd *v.* Dreyfus, 17 Hun, 600; Main *v.* Canavan, 8 Daly, 272; Hall *v.* Johnston, 6 Tex. Ap. 110; Gates *v.* Hughes, 44 Wis. 332 (*semble*); Maingay *v.* Lewis, Ir. R. 5 C. L. 229 (reversing s. c. Ir. R. 3 C. L. 495); Mathers *v.* Halliwell, 10 Grant, Ch. 172; Blackley *v.* Kenney, 19 Ont. Ap. 169 (compare Aldous *v.* Hicks, 21 Ont. Ap. 95); Bailey *v.* Griffith, 40 Up. Can. Q. B. 418 (but see Birkett *v.* McGuire, 7 Ont. Ap. 53, and Allison *v.* McDonald, 23 Ont. Ap. 288, 20 Ont. Ap. 695), *Accord.*

Swire *v.* Redman, 1 Q. B. D. 536 (overruled); James *v.* Day, 37 Iowa, 164; Rawson *v.* Taylor, 30 Ohio St. 389 (*semble*); Barnes *v.* Boyers, 34 W. Va. 303, *Contra.* — Ed.

On the same principle, if a mortgagor sells the property subject to the mortgage, receiving the purchaser's promise to assume the payment of the mortgagor, and the mortgagee, with knowledge of this assumption, agrees with the purchaser to extend the time of payment, the mortgagor, being in effect a surety, will be discharged. Union Co. *v.* Harford, 143 U. S. 187 (but see Keller *v.* Ashford, 133 U. S. 610); George *v.* Andrews, 60 Md. 26; Chilton *v.* Brooks, 72 Md. 554 (*semble*); Dedrick *v.* Blyker, 85 Mich. 475; Calvo *v.* Davies, 73 N. Y. 211; Fish *v.* Hayward, 28 Hun, 456; Commercial Bank *v.* Wood, 56 Mo. Ap. 214; Wayman *v.* Jones, 58 Mo. Ap. 313 (repudiating Conn. Co. *v.* Mayer, 8 Mo. Ap. 18).

But see *contra*, Corbet *v.* Waterman, 11 Iowa, 86; James *v.* Day, 37 Iowa, 164 — Ed.

[1] The arguments of counsel are omitted. — Ed.

Mtgor sold & conveyed mtged realty subject to mtg. Mtgee (C) by agreement with grantee extended debt without consent of mtgor. Grantee did not assume paym of mtg debt: mtgor discharged to extent of value of land. Mtgor became surety to extent of value of land & land principal dr, for when grantee took subject to mtg, mtgor had rt of subrogation. This rt was tied up & risk altered when mtgee extended debt so mgor discharged to extent of value. He is P as to rest of debt.

FINCH, J. The trial court held, that the extension by plaintiffs' testator of the time of payment of defendant's bond and mortgage, by a valid agreement with her grantee, who had taken a deed subject to the mortgage but without assuming its payment, operated to discharge the defendant wholly from liability. This conclusion rested upon the rule applicable to principal and surety, which forbids the former to change the essential terms of the contract without the consent of the latter, except at the peril of the surety's complete discharge. In most of these cases the Courts have refused to enter upon the inquiry whether the surety was damaged or not by the change, and the justification of such refusal ordinarily lies in the fact that the surety is bound only by the contract which he made, and not by the new and substituted one which alone can be legally enforced. Ducker *v.* Rapp.[1] But the present is not a case of principal and surety in the strict and technical definition of such relation; and upon that fact the General Term founded a different view of the rights of the parties, and reversed the decision of the Special Term on appeal. Conceding that, by the conveyance subject to the mortgage, the land became the primary fund for the payment of the mortgage debt, and that the grantor in defence of his liability on the bond had the right to pay the mortgage debt and be subrogated to the remedies of the creditor, and so could enforce payment out of the land to the extent of its value, (Johnson *v.* Zink,[2] Flower *v.* Lance,[3]) the General Term nevertheless held, affirming the authority of Penfield *v.* Goodrich,[4] that the mortgagor and grantor was all the time the principal debtor, and the grantee only became such when he covenanted to pay the mortgage debt and assumed it as a personal liability. We do not approve of this conclusion, or the result to which it leads, and deem it our duty to affirm the decision of the Special Term, although not approving the doctrine upon which it rests, except with some necessary qualification.

While, as we have said, no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to the mortgage, an equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of a surety, the terms of whose contract have been modified. We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is the primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond, it is not inaccurate to say that as grantee, and in respect to the land, and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor has the equities of a surety. This follows inevitably from the right of subrogation which inheres in the original contract of sale and conveyance. It is a definite and recognized right,

[1] 67 N. Y. 473.
[2] 51 N. Y. 336.
[3] 59 Id. 603.
[4] 10 Hun, 41.

which, in the absence of an express agreement, will be founded upon one implied. Gans *v.* Thieme.[1] When the mortgagor in this case sold expressly subject to the mortgage, remaining liable upon his bond, he had a right as against his grantee to require that the land should first be exhausted in the payment of the debt. Presumably the amount of the mortgage was deducted from the purchase-price, or at least the transfer was made and accepted in view of the mortgage lien. Seller and buyer both acted upon the understanding that the land bound for the debt should pay the debt as far as it would go, and their contract necessarily implied that agreement. Through the right of subrogation the vendor could secure his safety, and that right could not be invaded with impunity. It was invaded. When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated, and never consented to. The value of the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation. What he did was a conscious violation of this right, for the fact that he dealt with the grantee for an extension of the mortgage shows that he knew of the conveyance, and that it left the land bound in the hands of the grantee. Knowing this, he is chargeable with knowledge of the mortgagor's equitable rights, and meddled with them at his peril. But it does not follow that the vendor was thereby wholly discharged. The grantee stood in the *quasi* relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in any manner disturbed. The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value. At the moment of the extension his right of subrogation was taken away, and at that moment he was discharged to the extent of the value of the land, since the extension barred his recourse to it, and once discharged he could not again be made liable. From that moment the risk of future depreciation fell upon the creditor who by the extension practically took the land as his sole security to the extent of its then value, and assumed the risk of getting that value out of it in the future. But the Special Term went further and held that the mort-

[1] 93 N. Y. 232.

gagor was absolutely discharged by the extension. That might or might not be, and depended upon the question whether the value of the land equalled or fell below the debt. For conceding the general rule that the surety is discharged utterly by a valid extension of the time of payment, and that the mortgagor stands in the position and has the rights of a surety, it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land: and beyond that is still principal debtor without any remaining equities. . . .[1]

The judgment of the General Term should be reversed and that of the Special Term affirmed with costs.

All concur. *Judgment accordingly.*[2]

MARY METZ *v.* HELEN G. TODD AND OTHERS.

IN THE SUPREME COURT, MICHIGAN, JUNE 6, 1877.

[*Reported in* 36 *Michigan Reports*, 473.]

APPEAL in Chancery from Calhoun Circuit.

E. Baxter and *J. C. Post*, for complainants.

Severens, Boudeman & Turner, for defendants.

COOLEY, CH. J. This is a foreclosure suit. The mortgage was given by defendants Helen G. Todd and Alice M. Terry, to secure the payment of four promissory notes made by third persons, and which the mortgagors had delivered to complainants on a purchase of the land mortgaged. The bill avers that the four notes were delivered to the complainants "as security for the payment of the purchase price," and that the mortgage was taken at the same time to secure the payment of the notes. It is claimed by the defence that the notes were received in payment for the land, and that the purchasers were not to be looked to for payment except upon the mortgage and according to its conditions. The evidence satisfies us that this defence is well founded.

It is also claimed on the part of the defence that on the only note now remaining unpaid, and which was made by one Frink, the mortgagees, for a consideration paid to them, and without the knowledge of the mortgagors, extended the time of payment. The mortgagors then insist that, though not personally at any time liable as sureties, yet as owners of the mortgaged land they occupied that position, and consequently the extension granted to the principal debtor, without their

[1] The Court here considered the evidence, and inferred that the value of the land equalled the amount of the mortgage debt. — ED.

[2] Travers *v.* Dorr (Minn., 1895), 62 N. W. R. 269, *Accord.*

Shepherd *v.* May, 115 U. S. 505 (*semble*); Keller *v.* Ashford, 133 U. S. 610, 625, (*semble*; but see Union Co. *v.* Harford, 143 U. S. 187, 190); Chilton *v.* Brooks, 72 Md. 554 (*semble*), *Contra.* — ED.

consent, discharged the land from the mortgage lien. That the claim is well founded if the proof establishes the extension, we think is undoubted. Neimcewicz *v.* Gahn,[1] and Gahn *v.* Niemcewicz,[2] Christner *v.* Brown.[3] We also find the facts to be in accordance with the theory of the defence. *The decree must be affirmed, with costs.*

The other Justices concurred.[4]

FRAZER *v.* JORDAN.

IN THE QUEEN'S BENCH, JULY 4, 1858.

[*Reported in* 8 *Ellis & Blackburn*, 303.]

COLERIDGE, J., now delivered the judgment of the Court.

This was an action by the indorsee against the drawer of a bill of exchange: and the defendant pleaded that the plaintiff, without the defendant's consent, had entered into an agreement with Messrs. Kerin that they would give time to the acceptor in consideration of Messrs. Kerin promising that they would see the bill paid.

The first question for our consideration, on the special case stated for our decision, was whether the plea was proved. This was a question of fact; and we intimated our opinion, during the argument, that that plea was proved by the facts stated.

The remaining question on which we took time to consider was, whether a binding agreement, for a good consideration, with a person who is no party to a bill of exchange, to give time to the acceptor, without the consent of the drawer, discharges the drawer.

It was said, in support of the plea, that the plaintiff had placed himself in such a situation as that he could not sue the acceptor without rendering himself liable to an action for damages. And it was said that the case fell within the doctrine laid down by the Court of Exchequer in the case of Moss *v.* Hall,[5] where Parke, B., says: "Whenever a party's hands are effectually tied up, so that he cannot break such an engagement without being made liable for a breach of it, the surety is discharged, the rule being that there must be either a new security given to extend the time, or a binding agreement, upon a sufficient consideration, to suspend the remedy." It was said that the case of Ford *v.* Beech[6] had established that a contract of this nature with the acceptor to suspend proceeding does not constitute a defence to an action, but only gives a cross action for breach of the agreement to

[1] 3 Paige, 614. [2] 11 Wend. 312. [3] 16 Iowa, 130.

[4] Approved in Dedrick *v.* Blyker, 85 Mich. 475, 482.

See Blackley *v.* Kenney, 19 Ont. R. 169; 18 Ont. Ap. 135. — ED.

[5] 5 Exch. 46, 50. [6] 11 Q. B. 852.

Metz v. Todd

Purchaser of land gave note of 3d person in paym & secured by mtg to vendr. Mtgee (vendr) gave time to maker w/o consent of mtgor.

Held: mtgor has defence & land can not be foreclosed upon by mtgee (C) Reason mtgor's land became liable for debt & hence mtgor were virtually sureties.

give time, and therefore that the exoneration of the surety in such case does not depend on the action against the principal debtor being barred by the agreement; and that the real reason of the discharge is that the party has subjected himself to an action for suing in breach of the agreement; and that this extends to the case of a contract with a stranger as well as to one with the principal debtor, as the being liable to an action if he sues the debtor will render the creditor less likely to sue the debtor in proper time.

There certainly were authorities from which it has been often supposed that the reason of the discharge of the surety, by an agreement with the principal debtor to give time to him, arose from the right of action against the acceptor being suspended or gone. The doctrine so well established, that a parol agreement, on good consideration, to give time to a bond debtor, does not discharge the bond surety at law, because a parol contract cannot affect a contract under seal, seems founded on this notion; as does also the doctrine of its being necessary that there should be a consideration for the promise to make it binding in point of law, though such consideration would be requisite as well to found an action for damages on the promise, as to raise a defence to the action on the original cause of action. Since the case of Ford *v.* Beech,[1] however, we must take it for granted that agreements of this nature operate only to give a cross action, and do not prevent an action on the original cause of action.

However the doctrine arose, we must consider it quite settled that an agreement, for good consideration, with the principal debtor, so far ties up the hands of the creditor who has entered into such an agreement, as that the surety is discharged; and we quite agree with the doctrine of Lord Wensleydale, in Moss *v.* Hall,[2] that this remains law, notwithstanding the argument which appears to have been raised in that case, founded on Ford *v.* Beech.[1] The surety has a right at any time to go to the creditor and say, "I suspect the principal debtor to be insolvent; I will pay you; and I wish you to sue him." See the observations of Williams, J., in Strong *v.* Foster.[3] If, by a binding agreement with the principal debtor, the creditor has agreed not to sue him for a limited time, it would be a breach of faith of which the principal debtor would have a right to complain, if an action were brought against him within the period. And this is held to discharge the surety, although it seems, from Ford *v.* Beech,[4] that he could still do so at the risk of an action by the principal debtor on the contract to suspend suing. It is, however, a very different question whether this doctrine is to be extended for the first time to a case of a contract with a stranger, of which the debtor is ignorant, to which he is not privy, and in which the damages to the stranger for breach of contract may be merely nominal. The doctrine contended for would go the length of establishing that, whenever the creditor has placed himself in a

[1] 11 Q. B. 852.
[2] 5 Exch. 46.
[3] 17 Com. B. 201, 219.
[4] 11 Q. B. 842, 852.

position in which it is against his interest to sue the debtor, he has discharged the surety.

We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor, having given no consideration for the promise, has no ground to complain of the breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either at law or in equity (see Lord Abinger's observations in Lyon *v.* Holt),[1] for him to insist on such a contract can be founded. The stranger may have some private reason of his own to wish for some indulgence to be shown; and, if he has given a good consideration, may be entitled to damages, — nominal, or large or small, according to any legal interest he may have; but surely he is the only person to take advantage of his contract.

No such doctrine as that there can be a discharge in such case arising from a contract with a stranger has ever yet been established. In all the text-books which were cited, the rule is laid down as to a binding contract *with the acceptor or principal debtor.* The case of Moss *v.* Hall,[2] on which the principal reliance was placed by the defendant, was the case of a contract with the acceptor; and it was to such a case that the observations of Lord Wensleydale were addressed: and the only case in which it has been suggested that a contract with a stranger would be sufficient is a strong authority against such a doctrine. That was the case of Lyon *v.* Holt,[3] which was an action by the indorsee of a bill of exchange, alleged in the declaration to have been drawn by Hobson on Hynes, and indorsed by the drawer to the defendant, and by him to Messrs. Woosters, and by them to the plaintiffs. The defendant pleaded that the indorsement by the defendant was not directly to Woosters, but was an indorsement by the defendant to John Holt & Co. (persons other than the defendant), and by John Holt & Co. to Woosters, and that there had been an agreement between the plaintiffs and John Holt & Co. to give time to all the parties on the bills in question, amongst others, and a giving of time in consequence. At the trial, the agreement between the plaintiff and John Holt & Co. to give time to all the parties on the bill, and the giving the time, was proved: but it was not proved that John Holt & Co. were parties to the bill. A verdict having passed for the defendants, and a rule having been obtained to enter a verdict for the plaintiffs, the question arose, whether it was a material allegation that John Holt and Co., the persons with whom the agreement was made, were parties to the bill; and it was suggested that it was sufficient to show a contract to give time *to* the acceptor, and that there was nothing in the authorities to show that the contract must be *with* him. The Court, after taking time to consider, held that the plea was not proved, and ordered the verdict to be entered for the plaintiffs. This was a

[1] 5 M. & W. 253, 4. [2] 5 Exch. 46. [3] 5 M. & W. 250.

Frazer v Jordan

Indorsee v drawer (surety). Bill was accepted by A, and Δ pleaded that Π had promised to give time to A, on consideration of a promise by K to see the bill paid. A apparently knew nothing about this & gave judgment for Π. Promise was made to a stranger K, and hence the Π could have sued the acceptor at any time, & hence the R of subrogation of surety was not tied up.

decision that the allegation, that the person with whom the agreement to give time to prior parties on the bill is made is a party to the bill, is a material part of the plea. If, as contended in the present case, a contract with a stranger was sufficient, the plea would have been proved by proof of the contract with Holt & Co., though they were strangers to the bills.

This is a distinct authority in favor of the plaintiffs; there is no case or doctrine the other way; and the text writers all treat the agreement which is to discharge the surety as one made with the principal debtor.

We are not inclined to extend the rule for the first time to a contract with a stranger; but, for the reasons already stated, we think that the plea is bad, and therefore that judgment should be entered for the defendant. *Judgment for the defendant.*[1]

MARY E. MILLER *v.* HENRY HATCH AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MAINE, AUGUST 3, 1881.

[*Reported in* 72 *Maine Reports*, 481.]

APPLETON, C. J.[2] This is an action of assumpsit on two promissory notes, dated September 15, 1871, signed by Farr, Hatch & Co. The defendant, Henry Hatch, was a member of that firm at the time the notes were given.

April 18, 1872, Hatch sold out his interest in the firm to Jerome L. Farr, for five thousand dollars. On August 3, 1872, notice was given in the papers of the dissolution of the firm of Farr, Hatch & Co., and that it was succeeded by the firm of Warren A. Farr & Co., which assumed the liabilities of the firm of Farr, Hatch & Co.

In December, 1872, the firm of Warren A. Farr & Co. became insolvent. The defence rests on the ground that after the dissolution of the firm of Farr, Hatch & Co. they stood in the relation of sureties on the note, and they were discharged by reason of the plaintiff's signing with others an agreement under seal in these words:

"We, the undersigned, creditors of Warren A. Farr & Co., of Boston, in the Commonwealth of Massachusetts, in consideration of one dollar, and other good and sufficient considerations to us severally paid by said Warren A. Farr & Co., the receipt of which is hereby acknowledged, do severally promise and agree with the said Warren A. Farr &

[1] Clark *v.* Birley, 41 Ch. D. 422, *Accord.* — ED.

[2] Only the opinion of the Court is given. — ED.

Co., that we receive in full satisfaction and discharge of our respective claims against them, the amount of sixty per cent. thereof in the following manner, namely: Twenty-five per cent. of said claims, respectively, in thirty days from the date hereof, and the remainder in sixty days from the same date of this instrument.

"Witness our hands and seals severally adopting the seal set opposite the first signature as the seal of each of us respectively, this thirty-first day of December, A. D. 1872.

"M. E. MILLER. [Seal.]"

This was signed by over forty creditors of the firm. Nothing was paid the plaintiff under this contract.

The jury found specially that the plaintiff had no knowledge of the assumption of the liabilities of the firm of Farr, Hatch and Company by that of Warren A. Farr and Company. Much of the argument of the learned counsel for the defendant, is devoted to proving that this finding was erroneous. In the view we take of the case, it is immaterial whether she knew of such assumption or not, inasmuch as she has done nothing to injuriously affect the rights of Farr, Hatch and Company.

Conceding, for the purpose of argument, that after the dissolution of the firm of Farr, Hatch and Company, the firm were to be regarded as sureties, the plaintiff, by her signature to the contract of December 31, 1872, has done nothing to discharge their liability. This was only an offer on condition. It was not accepted or performed by the firm to which it was made. The plaintiff gave no delay. She might have sued at any time. The contract was no present discharge of the plaintiff's rights. It was no bar to an instantaneous suit had she brought one. The agreement was purely executory. It was never executed. Nothing was ever paid. The only provision for a future discharge was upon the payment of the sum stipulated. Until that condition should be performed, the plaintiff's debt remains unaffected by the executory agreement for a discharge.

The authorities are in entire accord with this view of the case. In Clifton *v.* Litchfield,[1] it was held that an executory contract, by way of compromise to discharge a disputed, unliquidated claim, by the giving of the debtor's promissory note, for a sum less than the amount actually due, was not a bar to a suit upon the original demand, although the note has been tendered the creditor, if it has not been accepted. In Blake *v.* Blake,[2] the agreement was under seal. "The agreement," observes WELLS, J., "to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction, or discharge." In Cushing *v.* Wyman,[3] the question here presented was fully examined and considered, and it was then held that an executory agreement constituted no bar to a suit.

[1] 106 Mass. 34. [2] 110 Mass. 202. [3] 44 Maine, 121.

Miller v Hatch

Π was creditor of firm of Farr Hatch & Co. This firm was taken over by Farr & Co, former firm remaining sureties for debts. Π then signed agreement under seal to take in discharge of their debt 60% of face value, to be paid in certain instalments. Farr & Co went insolvent, & Π now sues Hatch of the old firm. It gave judgment for Π. Liability of Farr & Co was not varied or changed because the contract of Π was merely executory or unilateral, & until action by Farr & Co Π could sue at any time. Hence surety is not discharged.

Kulme v Coles

Bond was given by one B as principal, & H as surety for payment of money to Coles. Coles commenced action against B & then B gave him a cognovit, on condition that judgment should not be entered for a month. Judgment on bond could not have been obtained for a much longer period. H asks an injunction restraining Coles from prosecuting an action at law against him. At hearing injunction, remedy of surety is not limited here but is accelerated by this cognovit.

Prendergast v Keevey P. 178

Π's were sureties on bond given for supply of coal by Δ, to principals. Condition of Bond was that it should be void if Π's should pay amt due within one month after demand. Then ~~then~~ Π's alleged that Δ took a warrant of attorney from P. for payments of instalments by month, but on default in any payment, execution to issue for the whole. 1st instalment was not paid, & Δ's made demand on Π's. Π's now ask injunction restraining an action at law, & compelling bond to be delivered up.

At dismissed injunction. Liability of sureties never arose until demand, & then sureties were in a better position because execution could then be taken.

Upon some of the facts contested in the motion for a new trial, there is conflicting evidence, but there is no such preponderance as would justify or require our interference.

Motion overruled. Judgment on the verdict.[1]

WALTON, BARROWS, DANFORTH, PETERS, and LIBBEY, JJ., concurred.

HULME v. COLES.

IN CHANCERY, BEFORE SIR A. HART, V. C., JULY 20, 1827.

[*Reported in* 2 *Simons*, 12.]

A MOTION was made, in this cause, for an injunction to restrain the defendant, the administrator of Catherine Coles, deceased, from proceeding in an action which he had commenced against the plaintiff for recovering money due on a bond given to the deceased, in which the plaintiff had joined, as surety, with one Burckhardt. The facts admitted by the answer, and relied upon in support of the motion, were that in June, 1817, Catherine Coles had commenced an action upon the bond against Burckhardt, and on the 23d of that month, without the plaintiff's privity, took a *cognovit* from him for the amount of the debt, with a stipulation that no judgment should be entered up or execution issued until the 1st of August following. The plaintiff insisted that this proceeding was a giving of time to the principal, which discharged him, the surety, from all liability under the bond.

Mr. Shadwell and *Mr. Whitmarsh*, in support of the motion.

Mr. Sugden and *Mr. Campbell*, for the defendant.

A surety is never discharged by the delay of the creditor in suing the principal debtor, unless the creditor makes an agreement with the principal by which he is prevented from suing him. In this case the creditor's remedy against the principal was never lost, nor were his hands tied for a moment; by the arrangement the remedies of the surety were not diminished or affected in any manner. It is clear that, in the usual course, judgment could not have been obtained in the action until long after the 1st of August, and therefore the period for getting the benefit of the action has been shortened, and not extended. Prendergast *v.* Devey, Samuell *v.* Howarth, Davey *v.* Prendergrass, Boultbee *v.* Stubbs.[2]

[1] Badnall *v.* Samuel, 3 Price, 521; Vernon *v.* Turley, 1 M. & W. 316; Mueller *v.* Dobschuetz, 89 Ill. 176; Sohier *v.* Loring, 6 Cush. 537, 544; Harnsberger *v.* Geiger, 3 Grat. 144, *Accord.* — ED.

[2] 18 Ves. 20, see 26.

The VICE CHANCELLOR. The principle of discharging a surety by the giving of time by the creditor, is a refinement of a court of equity, and I will not refine upon it. By the arrangement complained of, time was not given, but the remedy was accelerated.

Motion refused.[1]

PRENDERGAST AND ANOTHER *v.* DEVEY AND OTHERS.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., DECEMBER 7, 1821.

[*Reported in* 6 *Maddock*, 124.]

THIS was a bill by sureties, to restrain an action against them upon a surety bond, and to have the bond delivered up, upon the ground that the creditors had given time to the principal debtors without the sureties' consent.

The facts appearing in the pleadings, and by a further statement agreed upon between the parties at the request of the Court, were these:

In September, 1818, the plaintiffs, as sureties for two persons of the name of Prendergast, coal merchants, became bound to the defendants, who supplied the Prendergasts with coals wholesale, in a penalty, conditioned to be void if the plaintiff should, within one month after demand on them, pay such balance or sum of money not exceeding £500 as should become due to the defendants upon settlement of accounts between them and the Prendergasts.

In June, 1819, it being alleged a balance of £1,099 was due from the Prendergasts to the defendants, the latter, without communicating with the plaintiffs, took from the Prendergasts a warrant of attorney for the amount, with a stay of execution if they should discharge the debt by instalments of £100 a month, and on default, execution was to issue for the whole.

The first instalment under the warrant of attorney having fallen due on the 21st of July, and not being paid, the defendants, on the 7th of August following, made a demand on the plaintiffs according to the terms of the bond, and in the succeeding Michaelmas Term brought the present action, which the bill sought to restrain.[2]

Mr. Wilson and *Mr. Roots*, for the plaintiffs.

Mr. Hart and *Mr. Rose*, for the defendants.

The VICE CHANCELLOR expressed his opinion that the warrant of attorney certainly gave time, which might have discharged the sureties

[1] Price *v.* Edmunds, 10 B. & C. 578; Suydam *v.* Vance, 2 McL. 99; Fletcher *v.* Gamble, 3 Ala. 335; Barker *v.* McClure, 2 Blackf. 14; Gardner *v.* Van Norstrand, 13 Wis. 543, *Accord.* — ED.

[2] The statement of the case and the arguments of counsel are abridged. — ED.

if they had been affected by it; but that here the sureties' liability not arising till demand, and previous to the demand default having been actually made by the debtors, so that execution might have instantly issued for the whole debt, the agreement made by the warrant of attorney was at an end, and the defendants were no ways injured, as there was nothing to interfere with their immediate recourse to the principal debtors.

The plaintiff's counsel then pressed upon the Court, that as the time of making the demand was entirely in the option of the creditors, it was unjust they should be permitted, while withholding it, to deal with the debtors as they thought proper, until the sureties' recourse to the debtors might be defeated in effect, although not legally gone; but his Honor thought the terms of the engagement, though singular and improvident, bound him to the construction he had put upon it, and dismissed the bill.

KIRBY *v.* LANDIS AND OTHERS.

IN THE SUPREME COURT, IOWA, JUNE 18, 1880.

[*Reported in* 54 *Iowa Reports*, 150.]

ACTION upon a surrendered promissory note, signed by all the defendants as joint makers. The defendants S. M. and W. F. Miller were in fact merely sureties. At the time of the maturity of the note the principal, Landis, paid a part and applied for an extension on the balance. The extension was granted on condition that Landis would give a new note signed by the same persons. Afterward Landis presented a note for the balance signed by himself, and purporting to be signed by the other makers of the original note, S. M. Miller and W. F. Miller. Their signatures, however, were forged. The plaintiff, not discovering the forgery, accepted the new note and surrendered the old. He now claims the right to recover upon the latter notwithstanding the surrender, it having been procured by fraud.[1]

ADAMS, CH. J. The surrender of the note having been procured by fraud, we think that the plaintiff should be allowed to recover upon it, not only against the principal but the sureties, unless the plaintiff, by holding the substituted note, without informing the sureties of the fraud after it was discovered, had waived the fraud, or unless the sureties were prejudiced by the surrender. The sureties do not aver a waiver of the fraud, but they do aver, in substance, we think, that they were prejudiced by the surrender. The precise language of the averment is, "that the surrender and delivery of said note to the said

[1] The statement of the case is abridged. — ED.

Landis at or before its maturity, as aforesaid, lulled these defendants into security, and led them to believe said note paid by said Landis, and being so misled by plaintiff's acts in the premises they took no thought or action as to their indemnity against said Landis." They do not expressly aver that they had knowledge of the surrender, but we think that it is necessarily to be implied that they had from the averment that the surrender lulled them into security. The plaintiff insists that the sureties were not affected except so far as they might be deemed to be so by simple forbearance to sue. This would be true if they had no knowledge of the surrender, but in such case it would not be true, as averred, that they were lulled into security by the surrender.

If the plaintiff had told them that the note had been paid they would certainly have been justified, in the absence of all knowledge to the contrary, in assuming the plaintiff's statement to be true, and in governing themselves accordingly. The surrender of the note was equivalent to a declaration that it had been paid or satisfied in some way, and if the fact of the surrender came to the knowledge of the sureties it was equivalent to a declaration made to them that the note had been paid or satisfied in some way. We think, therefore, that under the averments of their answer they must be deemed to have been prejudiced. It is true, they might not in fact have protected themselves if the note had not been surrendered. But it was not incumbent upon them to aver what they would have done. It was sufficient to aver that they might have protected themselves but for the surrender, and lost the opportunity of doing so by reason of it.

In our opinion the answer showed a good defence, and the plaintiff's demurrer to it should have been overruled. *Reversed.*

HUBBARD *v.* HART AND ANOTHER.

IN THE SUPREME COURT, IOWA, JUNE 14, 1887.

[*Reported in* 71 *Iowa Reports*, 668.]

ACTION on a promissory note on which defendant is surety. Verdict and judgment for plaintiff, and defendant appeals.

Temple & Phelps, for appellant.

R. G. Phelps, for appellee.

REED, J. The defences pleaded are (1) that there had been an extension of the time of payment of the debt by a contract between plaintiff and the principal debtor, without the knowledge or consent of defendant.[1]

[1] Only what relates to this plea is given. — ED.

Kirby v Landis et al

Ds were co makers of note, Landis being P. and others sureties, at maturity P wanted extension, + he made part payment, giving note for balance, apparently signed by sureties, but really forged. P accepted note, + surrendered old note, + now tries to hold sureties on it. Ct gave judgment for sureties. P is entitled to recover unless P had waived fraud, or sureties were prejudiced. Here they were prejudiced since they "were lulled into security" by the surrendered note. Surrender of note was equivalent to declaration of payment.

Hubbard v Hart et al

note made by Δ et al co principal & sureties, several renewals were made, in all of which the names of the sureties were forged, & the old notes were surrendered. Π did not discover this until he went to collect on last note, & gave judgment for Π. Note was not extinguished by surender, it having been obtained by fraud, & hence surety is not discharged.

Morrison v Foster

Δ & Smith made joint & commissory note. Δ filed bill that Π had extended time of payment knowing Δ was surety, as Smith having various interest, election could not have been maintained on note before time of extension, even tho it was usurious. only remedy of Smith was to sue to recover excess, or to repudiate whole transaction. Held there was a binding agreement, & surety is discharged by it. Judgment for Δ.

I. The note in suit was given on the eighteenth of August, 1882, and became due in six months from that date. When it matured, Hart, the principal maker, desired an extension, and he presented to plaintiff a new note, signed by himself, and to which defendant's name was also signed, which plaintiff accepted, and he surrendered the former note. At the maturity of this note, Hart again presented a note to which defendant's name was signed, and secured a second extension. But it afterwards transpired that he had forged defendant's signature to both of these instruments. That fact was not discovered by plaintiff until he sought to collect the third note from defendant after its maturity. As the surrender of the original note and the extensions of time were obtained by fraud, the note was not extinguished by the surrender. Nor was the surety discharged by the extensions of time. Kirby *v.* Landis.[1]

MOULTON *v.* POSTEN.

IN THE SUPREME COURT, WISCONSIN, APRIL 19, 1881.

[*Reported in* 52 *Wisconsin Reports*, 169.]

APPEAL from the Circuit Court for Fond du Lac County.

Action upon the joint promissory note of the defendant and one B. C. Smith.

LYON, J.[2] The learned judge of the Circuit Court ordered judgment dismissing the action, on the grounds, (1) that the plaintiff, by his agent, extended the time of payment of the note at the request of Smith, the maker, for whose debt it was given, without the consent of the defendant Posten, and with knowledge that the latter signed it for the accommodation of Smith.

We think it a fair deduction from the testimony of both witnesses that Moulton agreed, in terms, in July, 1873, to give an extension until after threshing, that is, until the next autumn; and we must consider the case as though the fact had been found more specifically. The precise question is, whether an action could have been maintained on the note in suit before the time of the alleged extension had elapsed. If it could, there was no valid extension, and the surety is not discharged. If the right of action was thereby suspended, he is discharged. Had Smith paid money for the extension, it would have bound the plaintiff, and the defendant would have been released from liability on the note.[3]

[1] Bangs *v.* Strong, 10 Paige, 11, *Accord.*

See also Scholefield *v.* Templer, 4 De G. & J. 429. — ED.

[2] Only the opinion of the Court upon the effect of the agreement to forbear is given. — ED.

[3] Vary *v.* Norton, 6 F. R. 808; Myers *v.* First Bank, 78 Ill. 257; Lemman *v.* Whitman, 75 Ind. 318; Kelly *v.* Gillespie, 12 Iowa, 56; Kenningham *v.* Bedford, 1 B. Mon.

This is expressly ruled in the late case of Hamilton v. Prouty,[1] where the whole subject is very fully discussed and the authorities collected, in the opinion of Mr. Justice Cassoday.

It seems to us that the doctrine of that case is applicable here, notwithstanding Smith gave his note for the premium instead of paying it in money as was there done. The money paid in that case and the note given in this case were alike in excess of the highest legal rate of interest. The money there paid could have been recovered back by the party who paid it if sued for in time. So here, if Smith has paid his note given for the consideration of the extension, or hereafter pays it, he may maintain his action to recover back the money paid if brought within the prescribed time. And in either case the statutory penalty could also be recovered.

It was held in Hamilton v. Prouty, that although the transaction was usurious, it was binding upon the plaintiff, who received the money for the extension, and he would not be allowed to assert the illegality of the transaction and maintain an action on the note before the agreed period of extension expired. No good reason is perceived why the same rule is not applicable to this case. The agreement for extension was executed by the giving of a note for the consideration of it as effectually as it would have been by paying the same in money. It is only a different mode of execution. Had the plaintiff brought an action on the note in suit before the time of extension expired, it seems to us that the action would have abated on proof that he had agreed to extend and received Smith's note for the consideration of the extension. He could not have been heard to allege that the note taken for the extension was usurious, and that there was no consideration for his agreement to extend. The right to make that allegation was in Smith alone. We conclude that the case is within the rule of Hamilton v. Prouty, and hence that the defendant is discharged from liability on the note.

By the Court. *Judgment affirmed.*[2]

225; Stillwell v. Aaron, 69 Mo. 539; Wild v. Howe, 74 Mo. 551; Bank v. Woodward, 5 N. H. 99; Billington v. Wagoner, 33 N. Y. 31 (virtually overruling *dicta* in Vilas v. Jones, 1 N. Y. 274, 286, 287); Draper v. Trescott, 29 Barb. 401; Nat. Bank v. Place, 15 Hun, 564; Scott v. Harris, 76 N. Ca. 205 (but see Bank v. Lineburger, 83 N. Ca. 454); Osborne v. Low, 40 Ohio St. 347; Mann v. Brown, 71 Tex. 241; Turrill v. Boynton, 23 Vt. 142; Austin v. Dorwin, 30 Vt. 38; Armistead v. Ward, 2 Pat. & H. 504; Glenn v. Morgan, 23 W. Va. 467; Hamilton v. Prouty, 50 Wis. 592, *Accord.*

In a few jurisdictions the statutes against usury are interpreted as making the usurious payment of necessity a part payment of the debt; and as a part payment of a debt is not a valid consideration for a promise by the creditor, there is no legal agreement to give time, and therefore the surety is not discharged. Jenness v. Cutler, 12 Kas. 500; Polkinghorne v. Hendricks, 61 Miss. 366; Nightingale v. Meginnis, 34 N. J. 461; Hartman v. Danner, 74 Pa. 36; Calvert v. Good, 95 Pa. 65 (compare Grayson's Ap. 108 Pa. 581); Cornwell v. Holly, 5 Rich. 47. The case of Howell v. Sevier, 1 Lea, 360, if not to be supported on this ground, must be deemed erroneous. — Ed.

[1] 50 Wis. 592.

[2] Scott v. Safford, 37 Ga. 384; Corielle v. Allen, 13 Iowa, 289; Fay v. Tower, 58 Wis. 286, *Accord.*

Kyle v. Bostick, 10 Ala. 589; Gilder v. Jeter, 11 Ala. 256; Anderson v. Mannon,

7 B. Mon. 217; Duncan *v.* Reed, 8 B. Mon. 382; Roberts *v.* Stewart, 31 Miss. 664 (*semble*); Wilson *v.* Langsford, 5 Humph. 320; Smith *v.* Woodbury, 36 Vt. 303, *Contra*.

The cases in the preceding paragraph proceeded upon the theory that a note for the usurious amount was to be treated like any other promise. It is generally held, where there are merely mutual promises to give time and to pay usury (no note being given), that the surety is not discharged, because neither promise is enforceable. Cox *v.* Mobile Co., 37 Ala. 320; Galbraith *v.* Fullerton, 53 Ill. 126; Silmeyer *v.* Schaffer, 60 Ill. 479; Braman *v.* Howk, 1 Blackf. 392; Tudor *v.* Goodloe, 1 B. Mon. 322; Pyke *v.* Clerk, 3 B. Mon. 262; Scott *v.* Hall, 6 B. Mon. 285; Berry *v.* Pullen, 69 Mo. 101; Ives *v.* Bosley, 35 Md. 262 (*semble*); Roberts *v.* Stewart, 31 Miss. 164; Fernan *v.* Doubleday, 3 Lans. 216; Thayer *v.* King, 31 Hun, 437; Payne *v.* Powell, 14 Tex. 600; Burgess *v.* Dewey, 33 Vt. 618; Meiswinkle *v.* Jung, 30 Wis. 361. (But see Riley *v.* Gregg, 16 Wis. 666.)

But see *contra*, Stallings *v.* Johnson, 27 Ga. 564; Parmelee *v.* Williams, 72 Ga. 42; Wheat *v.* Kendall, 6 N. H. 504; Wright *v.* Bartlett, 43 N. H. 548, 551; Draper *v.* Trescott, 29 Barb. 401, 407; Armistead *v.* Ward, 2 Pat. & H. 504, 514.

On the same principle it has been thought that a promise to give time to the principal in consideration of a counter promise, not enforceable because of the Statute of Frauds, would not discharge a surety. Philpot *v.* Briant, 4 Bing. 717; Agee *v.* Steele, 8 Ala. 948; Berry *v.* Pullen, 69 Me. 101, 104. It is well settled, however, that the inability of one of the parties to a bilateral contract to sue the other because of the Statute of Frauds, does not affect his own liability. — Ed.

SECTION III.

Defences based upon Principal Debtor's Right of Set-off or Counter-claim against the Creditor.

GILLESPIE AND ANOTHER *v.* TORRANCE.

IN THE COURT OF APPEALS, NEW YORK, SEPTEMBER, 1862.

[*Reported in* 25 *New York Reports*, 306.]

APPEAL from the Superior Court of the city of New York. Action upon a promissory note against the indorser only. Defence, that the indorsement was for the accommodation of the maker; that the note was one of several given for oak timber sold to the maker by the plaintiffs; that the timber was a raft in the Hudson river, opposite the city of New York, and that, on making the sale, the plaintiffs produced certificates of inspection showing that there were 29,441 feet of first quality oak, for which Van Pelt, the maker of the notes, agreed to pay 27½ cents per foot, and 5,523 feet of second quality or refuse oak, for which Van Pelt agreed to pay 13¾ cents per foot; that, by the usage of the timber trade in New York, the seller is deemed to warrant that the timber sold corresponds in quantity and quality with the description in such inspection certificates; that Van Pelt gave his notes, indorsed by the defendant, for various sums, amounting in the aggregate to $9,000, the price of the timber as computed from the inspection certificates, and all of which notes had been paid except the one in suit; that after the delivery of the timber it was discovered that the inspection certificates were erroneous in this, that of the timber of first quality there was 15,000 feet less than the certificates stated, and an equal excess in the refuse timber; that if the prices had been correctly computed according to the fact, instead of being computed according to the certificate, it would have amounted to less than $5,000; that the plaintiffs had, therefore, been overpaid, and there was no consideration for the note in suit. On the trial, the judge, under exception by the defendant, excluded evidence as to the quantity of the timber of the different qualities; declined to permit an amendment of the answer alleging an express warranty; and excluded evidence of the usage set up in the answer, making a sale by certificate equivalent to a warranty. The other facts stated in the answer were substantially proved or admitted. The plaintiffs had a verdict and judgment, which having been affirmed at general term, the defendant appealed to this court.

Charles A. Rapallo, for the appellant.

William Stanley, for the respondents.

SELDEN, J. The defence in this case is not founded on a failure of the consideration of the note, otherwise than by a defect in the quality of the timber for which it was given. That being so, if there was neither warranty nor fraud in the sale of the timber, the defect in quality constitutes no defence. Seixas *v.* Woods;[1] Sweet *v.* Colgate;[2] Welsh *v.* Carter;[3] Johnson *v.* Titus.[4] The answer does not allege fraud in the transaction, and unless it shows a warranty of the quality of the timber, it presents no defence to the note, either partial or total. The argument of the appellant's counsel, to maintain the position that the defence rested upon a failure of consideration, and not upon a claim for damages on a breach of warranty, is very ingenious; but the answer and the proof show that all the timber contracted to be delivered to Van Pelt, and for which the notes were given, was in fact delivered, and the real ground of complaint is, that a much larger proportion of it than was shown by the inspector's certificates, upon the faith of which the purchase was made, proved to be of inferior quality. The law being well established that such defect of quality, in the absence of fraud or warranty, constitutes no defence to the note, or to any part of it, and there being no pretence of fraud, it follows that the defence, if there is any, rests upon a breach of warranty.

The question then arises, whether the plaintiff, an accommodation indorser upon a note given by Van Pelt to the plaintiffs for the timber, can avail himself of a breach of the contract of warranty in regard to the quality of the timber, made by the plaintiffs to Van Pelt, on the sale to him. To decide this question, it is necessary to ascertain the ground upon which such defences, by way of recoupment, as they were denominated prior to the adoption of the Code, now partially, if not wholly, merged in the much broader term, counter-claim, were admitted. If we regard such defences as resting upon a failure of the consideration of the contract on which the plaintiff's action is founded, then unquestionably the defendant could avail himself of the breach of warranty in this case, because an indorser or surety may always, where the contract has not been assigned, show a failure, partial or total, of consideration of his principal's contract which he is called upon to perform. But if such defences are regarded as the setting off of distinct causes of action, one against the other, then it is clear, as will be shown hereafter, that this defendant could not avail himself of such defence.

The subject of the precise ground on which a defendant is allowed to reduce a recovery against him, in an action upon a contract, by alleging and proving fraud or breach of warranty — whether the contract, where there is fraud, is regarded as destroyed, and the recovery had on a *quantum meruit*, or whether the reduction of the plaintiffs' claim rests upon a partial failure of consideration, or upon the setting off of distinct claims against each other — has often been discussed, but without any general concurrence of opinion on the question. Reab

[1] 2 Caines, 48.
[2] 20 John. 196.
[3] 1 Wend. 185.
[4] 2 Hill, 606.

v. McAllister;[1] Batterman v. Pierce;[2] Ives v. Van Epps;[3] Nichols v. Dusenbury;[4] Van Epps v. Harrison;[5] Barber v. Rose;[6] Baston v. Butler;[7] Withers v. Greene.[8]

A careful examination of the subject, I think, must lead to the conclusion, that wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other. This would seem to follow from the right of election, which all the cases admit the defendant has, to set up his claim for damages by way of defence, or to resort to a cross-action to recover them. Ives v. Van Epps;[9] Batterman v. Pierce;[10] Britton v. Turner;[11] Halsey v. Carter;[12] Barber v. Rose;[13] Stever v. Lamoure.[14]

In many cases the defendant's damages would exceed the amount of the plaintiff's claim, which shows conclusively that such damages do not rest upon a mere failure of consideration. Where there is fraud, the party deceived, on discovering the fraud, may rescind the contract; but if he does not do that, the contract on his part remains entire, not broken and not modified, and he is bound to perform it fully according to its terms: he has, however, arising from the fraud, a distinct cause of action, the amount of which he may set off against any liability on his part growing out of the transaction in which the fraud was perpetrated. As was said by Bronson, J., in Van Epps v. Harrison: "When sued for the price, the vendee may in general *recoup* damages; but while he retains the property he cannot treat the contract as wholly void, and refuse to pay anything. By retaining the property he *affirms the validity of the contract*, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud." The same principle is applicable to cases of warranty, except that the breach of warranty gives no right to rescind, unless there is an express contract to that effect. Street v. Blay;[15] Voorhees v. Earl;[16] Cary v. Gruman;[17] Muller v. Eno;[18] Thornton v. Winn;[19] Lattin v. Davis.[20] In ordinary cases of breach of warranty, therefore, both contracts remain binding to their full extent, and where recoupment is allowed, damages for a breach on one side are set off against like damages on the other side. The "cross-claims arising out of the same transaction compensate one another, and the balance only is recovered." 8 Wend. 115; 22 id. 156; 3 Hill, 174; 2 Comst. 286.

It has always been optional, as is suggested above, since the doctrine

[1] 4 Wend. 90 *et seq.*; s. c. in error, 8 id. 109.
[2] 3 Hill, 171, 177.
[3] 22 Wend. 155.
[4] 2 Comst. 286.
[5] 5 Hill, 66.
[6] Id. 78.
[7] 7 East, 479.
[8] 9 How. U. S. 213.
[9] 22 Wend. 157.
[10] 3 Hill, 171.
[11] 6 N. H. 481.
[12] 1 Duer, 667.
[13] 5 Hill, 81.
[14] Lalor's Supp. 352, note a.
[15] 2 Barn. & Ad. 456.
[16] 2 Hill, 288.
[17] 4 Id. 625.
[18] 14 N. Y. 597.
[19] 12 Wheat. 183.
[20] Lalor's Supp. 16.

of recoupment has gained a foothold in the courts, with a party who has sustained damages by fraud or breach of warranty in the purchase of goods, when sued for their price, to set off or recoup such damages in that action, or to reserve his claim for a cross-action; and when he elected to recoup he could not, under the Revised Statutes, have a balance certified in his favor, nor could he maintain a subsequent action for such balance. Sickles *v.* Pattison;[1] Batterman *v.* Pierce;[2] Wilder *v.* Case;[3] Stever *v.* Lamoure;[4] Britton *v.* Turner.[5]

Under the Code of Procedure, doubtless a balance might be recovered: Code, §§ 150–274; Ogden *v.* Coddington;[6] but the right of election to set up a counter-claim in defence, or to bring a cross-action for it, still exists: Halsey *v.* Carter;[7] Welch *v.* Hazleton.[8] Now it is not easy to reconcile with these established principles, the right of the defendant in this suit to avail himself of the claim which Van Pelt may have against the plaintiffs on a breach of warranty. 1. Such damages constitute a counter-claim, and not a mere failure of consideration, and not being due to the defendant, cannot be claimed by him. Code, § 150; Lemon *v.* Trull.[9] 2. Van Pelt has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-action. The defendant cannot make this election for him. 3. If the defendant has a right to set up the counter-claim, and have it allowed, in this action, it must bar any future action by Van Pelt for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in cancelling a small one. If the right exists in this case, it would equally exist if the note was but $100 instead of $1,800. 4. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of Van Pelt, and all to remain unpaid, each of the indorsers would have the same rights as the defendant. If they were to set up the same defence, how would the conflicting claims be reconciled?

In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note cancelled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach of warranty. It is, however, an equity, in which Van Pelt is interested to as great, and possibly to a greater, extent than the defendant, and cannot be disposed of without having him before the Court, so that his rights, as well as those of the defendant, may be protected. That remedy may be open to the defendant still, notwithstanding the judgment; especially if the insolvency of the parties renders that course necessary for his protec-

[1] 14 Wend. 257.
[2] 3 Hill, 171.
[3] 16 Wend. 583.
[4] Lalor's Supp. 352, note a.
[5] 6 N. H. 481.
[6] 2 E. D. Smith, 317.
[7] 6 Duer, 667.
[8] 14 How. Pr. 97.
[9] 13 How. Pr. 248; 16 id. 576, note.

tion.[1] 14 Johns. 63; 17 id. 389; 2 Cow. 261; 2 Paige, 581; 6 Dana, 32; 8 id. 164; 2 Story's Eq. Jur. §§ 1446 a, 1437. My conclusion is, that the Court below was right in holding that the defendant could not set up the breach of warranty in defence, partial or total, to the suit on the note; and as the warranty presented the only ground on which there could be a claim of defence under the answer, there is no necessity for considering the other questions presented in the case.

The judgment should be affirmed.

All the judges concurring, *Judgment affirmed.*[2]

BECHERVAISE *v.* LEWIS.

IN THE COMMON PLEAS, MAY 22, 1872.

[*Reported in Law Reports, 7 Common Pleas,* 372.]

THE judgment of the Court (Willes, Keating, Montague Smith, and Brett, JJ.) was delivered by

WILLES, J.[3] The declaration is upon a promissory note made by the defendant payable to the plaintiff. The second plea, for a defence on equitable grounds, states that the note was not made by the defendant alone, but was a joint and several note by him and one Rowe; that it was made for and on account and in payment of a sum which Rowe had agreed to pay the plaintiff and for which the defendant was not liable otherwise than as surety for Rowe; that the plaintiff at the time of the making of the note knew that the defendant was a surety only; that the plaintiff, after the making of the note, became indebted to Rowe in an amount equal to the amount of the note and of all other moneys due from Rowe to the plaintiff, which

[1] Alcoy Railway *v.* Greenhill, 41 Sol. J. 330; Scholze *v.* Steiner, 100 Ala. 148; Becker *v.* Northway, 44 Minn. 61 (set-off); Brown *v.* Norcook, 17 N. J. Eq. 219 (*semble*); Morgan *v.* Smith, 7 Hun, 244, 245 (*semble*); Jarratt *v.* Martin, 70 N. Ca. 459; Clark *v.* Sullivan, 2 N. Dak. 103 (*semble*); Hiner *v.* Newton, 30 Wis. 640 (*semble*); McDonald Co. *v.* Moran, 52 Wis. 203, *Accord.* — ED.

[2] COUNTER-CLAIM. Osborne *v.* Bryce, 23 F. R. 171; Stockton Society *v.* Giddings, 96 Cal. 84 (*semble*); Lasher *v.* Williamson, 55 N. Y. 619; Newton *v.* Lee, 139 N. Y. 332; Lewis *v.* McMillen, 41 Barb. 420; Morgan *v.* Smith, 7 Hun, 244; Henry *v.* Daley, 17 Hun, 210; Emery *v.* Baltz, 22 Hun, 434; La Farge *v.* Halsey, 1 Bosw. 171; Phœnix Co. *v.* Rhea (Tenn. 1897), 40 S. W. R. 482 (affirming 38 S. W. R. 1079), *Accord.*

Meyer *v.* Stookey, 3 Ill. Ap. 336 (*semble*); Scroggin *v.* Holland, 16 Mo. 419; Aultman *v.* Hefner, 67 Tex. 54; Edmunds *v.* Harper, 31 Grat. 637 (statutory), *Contra.*

SET-OFF. A surety, sued alone, cannot reduce the plaintiff's claim by reason of a debt due from the latter to the principal. Beard *v.* Union Co., 71 Ala. 60 (but set-off allowed by statute with principal's consent, Scholze *v.* Steiner, 100 Ala. 148, 152); Thalheimer *v.* Crow, 13 Colo. 397; Glazier *v.* Douglass, 32 Conn. 393 (*semble*); Graff *v.* Kahn, 18 Ill. Ap. 485; Baltimore Co. *v.* Bitner, 15 W. Va. 455.

But see *contra*, Booe *v.* Watson, 13 Ind. 387 (statutory); Sefton *v.* Hargett, 113 Ind. 592 (statutory); Bronaugh *v.* Neal, 1 Rob. La. 23. — ED.

[3] Only the opinion of the Court is given. — ED.

Gillespie v Torrance

Indorsee v Indorser. A signed for accomodation of principal, note given in payment of timber on which there was a breach of warranty as to quantity. Lower ct excluded all evidence of breach of warranty & gave judgment for Pl. Ct of Errors sustained this. It held is really a set off or recoupment or counter claim & this ct only exists in Pl. Pleas in set which he will choose to take. If recoupment, or gross action, & A can't set for him. Judgment here would bar any defense of P might have on the claim, & could decide it. Leaving P before Ct.

Held S not entitled to set up P's counterclaim.

Contra [illegible]

Δ was surety co maker of note with P. Π had sold certain chose in action to P, but without recourse. Δ averred that he relied upon P being able to collect them & that has Π. In reality Π collected them, they being equal in amt to face of notes. Δ averred that he had made note relying on payment by to P, & plea was really that of a set off of debt due P. Ct allowed plea. If Δ is compelled to pay, he must have a rt against P for the full amt of debt, since P can set this up against creditor.

Tatum v. S. P had set off equal to C's claim, arising out of same transaction and S wants to set this up.

Held he could. Rt of reimburse not impaired as set up and strengthened of debt. Still S has rt of exon - here C indebted to P & P to C so P has defense at law to C and S is entitled in eq to call on C to exon. him. So S can set it up as eq defense.

debt remained unsatisfied; that the plaintiff became so indebted to Rowe without the consent of the defendant, and thereby without the defendant's consent prevented himself from recovering from Rowe the amount of the note. The plea then goes on to show how the plaintiff became indebted to Rowe, viz., by having received certain partnership debts which he had sold to Rowe, and for part of the purchase-money for which the note in question was given: it then goes on to aver that the defendant joined in making the note relying on the said sale, and on the faith and in the expectation and in consideration that the plaintiff would allow Rowe to receive the debts, and that there was no other consideration or value for making the note, which the plaintiff at the time of the making of the note well knew.

In substance, the plea is a special plea by a surety, of a set-off by the principal, arising out of the same transaction out of which the liability of the surety on the note arose.

A surety has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties.

The surety, however, has another right, viz., that, as soon as his obligation to pay is become absolute, he has a right in equity to be exonerated by his principal.

Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him.

In this state of things, we are bound to conclude that the surety has a defence in equity against the creditor; and we are justified in doing so by the authority of the civil law alluded to in the course of the argument, to be found in Dig. Lib. xvi. tit. II. section 4: "Verum est, quod et Neratio placebat et Pomponius ait, ipso jure eo minus fidejussorum ex omni contractu debere, quod ex compensatione reus retinere potest. Sicut enim cum totum peto a reo, male peto, ita et fidejussor non tenetur ipso jure in majorem quantitatem, quam reus condemnari potest."

There must, therefore, be judgment for the defendant upon the demurrer. *Judgment for the defendant.*[1]

Attorneys for plaintiff: *Miller & Miller.*

Attorney for defendant: *T. H. Smith.*

[1] Murphy v. Glass, L. R. 2 P. C. 408, *Accord.*
See also Alcoy Railway v. Greenhill, 1897, Ch., 41 Sol. J. 330. — Ed.

MAHURIN v. PEARSON AND BELLOWS.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, JULY, 1837.

[*Reported in* 8 *New Hampshire Reports*, 539.]

ASSUMPSIT on a note for $100, dated November 3, 1834, payable to the plaintiff, in sixty days, with interest. The defendant, Bellows, signed the note as surety for Pearson. The defendants pleaded the general issue, with notice of set-off of demands in favor of said Pearson. The plaintiff objected to receive said set-off, and the evidence offered in support thereof, on the ground of want of mutuality of the parties, the set-off being in favor of one of the defendants only; whereupon the Court rejected the set-off, and the evidence offered.[1]

PARKER, J. The Court erred in rejecting the set-off. It being shown that Bellows is a mere surety, we are of opinion there is sufficient mutuality in a debt due from the plaintiff to Pearson, to authorize it to be allowed in set-off, under our statute. Woods *v.* Carlisle;[2] Bourne *v.* Bennett;[3] *Ex parte* Hanson.[4] The cases in Vesey are cited without disapprobation by Chancellor Kent (Dale *v.* Cooke[5]); although he held as a general principle "that joint and separate debts cannot be set off against each other in equity any more than at law."

There are several considerations which show the propriety of allowing the set-off in this case. If the debt from the plaintiff to Pearson, which was offered in set-off, was contracted after that now in suit, it very probably might have been regarded by the parties as in effect a payment thus far. It is at least but equitable that it should so operate, whether contracted before or after. The rule in equity is, that if a creditor have security, the surety, on payment by him, is entitled to be substituted, and to have the benefit of that security. Hayes *v.* Ward;[6] Law *v.* The East India Company;[7] Evernghim *v.* Ensworth.[8] If, instead of having security, the creditor owes the principal part of the amount, and the principal is willing to put it in set-off, it is equally reasonable that the surety should have the benefit of the credit which the creditor has obtained of the principal. And, moreover, it will tend to prevent multiplicity of actions; for, should the plaintiff collect his debt of Bellows, the latter must have an action against Pearson to recover the amount, and Pearson will have a right of action on the claim now offered in set-off.

[1] The arguments of counsel are omitted, together with a part of the case not relating to the validity of the plea of set-off. — ED.

[2] 6 N. H. R. 27.

[3] 4 Bing. 423.

[4] 12 Ves. 349; 18 Ves. 232, s. c.

[5] 4 Johns Ch. R. 15.

[6] 8 Pick. 122; 4 Johns. Ch. R. 129.

[7] 4 Ves. 829.

[8] 7 Wend. 326.

Mahurin v Pearson et al

Δ's signed note jointly. Pearson being P, Δ's pleaded set off of claims due to Pearson from T, Evidence rejected below, Sup ct ordered set off allowed, [illegible] Held that [illegible] separate in favor of each, & that in [illegible] action.

Whether anything can be set off in this or any other case beyond the balance due from the plaintiff, on an adjustment of all the demands between the parties which are not comprehended in the suit, is a question not settled by this decision.

New trial granted.[1]

[1] SET-OFF. Harrison *v.* Henderson, 4 Ga. 198; Livingston *v.* Marshall, 82 Ga. 281; Himrod *v.* Baugh, 85 Ill. 435; Engs *v.* Matson, 11 Ill. Ap. 639; Hayes *v.* Cooper, 14 Ill. Ap. 490; Weir *v.* Dustin, 32 Ill. Ap. 388; Bonekel *v.* Lofquist, 46 Ill. Ap. 442; Reeves *v.* Chambers, 67 Iowa, 81; Spencer *v.* Almoney, 56 Md. 551; Becker *v.* Northway, 44 Minn. 61; St. Paul *v.* Leck, 57 Minn. 87; Raymond *v.* Green, 12 Neb. 215 (*semble*); Concord *v.* Pillsbury, 33 N. H. 310; Brewer *v.* Norcross, 17 N. J. Eq. 219 (*semble*); Wagner *v.* Stocking, 22 Ohio St. 297; Hollister *v.* Davis, 54 Pa. 508; People's Bank *v.* Legrand, 103 Pa. 309, 316 (*semble*); Guggenheim *v.* Rosenfeld, 9 Baxt. (Tenn.) 533; Brundridge *v.* Whitcomb, 1 D. Chip. 180; Downer *v.* Dana, 17 Vt. 518; Wartman *v.* Yost, 22 Grat. 595; Baltimore Co. *v.* Bitner, 15 W. Va. 455 (*semble*), *Accord.*

Woodruff *v.* State, 7 Ark. 333 (apparently overruled by Leach *v.* Lambeth, 14 Ark. 668); Banks *v.* Pike, 15 Me. 268; Walker *v.* Leighton, 11 Mass. 140; Warren *v.* Wells, 1 Met. 80; Robbins *v.* Brooks, 42 Mich. 62; Paine *v.* Lewis, 64 Miss. 96; Dart *v.* Sherwood, 7 Wis. 523, *Contra.*

SET-OFF OF JUDGMENTS. A judgment in favor of a principal alone may be applied to offset a judgment against the principal and surety. Bourne *v.* Benett, 4 Bing. 423; Peirce *v.* Bent, 69 Me. 381; Skinker *v.* Smith, 48 Mo. Ap. 91.

COUNTER-CLAIM. Where a surety, made a co-defendant with the principal, is allowed to reduce the plaintiff's claim by a debt due from the latter to the principal, he is allowed the same privilege as to a counter-claim of the principal against the plaintiff. Waterman *v.* Clark, 76 Ill. 428; Slayback *v.* Jones, 9 Ind. 470 (*semble*); McHardy *v.* Wadsworth, 8 Mich. 349; Edmunds *v.* Harper, 31 Grat. 637.

In New York if principal and surety are co-defendants in an action, upon a claim upon which a several judgment might be given against the principal, the latter may plead, by way of set-off or counter-claim, a demand of his against the plaintiff, and this plea will, of course, enure to the advantage of the surety.

Set-off. Springer *v.* Dwyer, 50 N. Y. 19; Bathgate *v.* Haskin, 59 N. Y. 533; Newell *v.* Salmons, 22 Barb. 647; Parsons *v.* Nash, 8 How. Pr. 454.

Counter-claim. Horton *v.* Dow, 10 N. Y. St. Rep. 139; Loring *v.* Morrison, 15 N. Y. Ap. Div. 498.

In *Ex parte* Hanson, 12 Ves. 346, 18 Ves. 232, a principal who was sued by the assignees of a bankrupt, was permitted to set off a claim due from the bankrupt to him and his surety jointly.

In Adams *v.* Varrell, 46 N. H. 17, a creditor sued by a principal was allowed to set off a claim against principal and surety. — ED.

SECTION IV.

Surrender or Loss of Securities by the Creditor.

PEARL v. DEACON.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 9, 1857.

(*Reported in* 3 *Jurist, New Series*, 879.[1])

IN November, 1853, Mr. Pearson, a publican, borrowed from the defendants, Messrs. Reid & Co., who were his landlords, the sum of £250. To secure the repayment of this sum he assigned to them a pension of £18 a year, and gave them a bill of sale of his furniture, stock-in-trade, and effects. As a further security, he gave the Messrs. Reid two promissory notes of £125 each, in one of which the plaintiff joined as surety. Another person joined as surety in the second note. The plaintiff was informed at the time he became surety that the bill of sale of Pearson's furniture and effects had been given to Messrs. Reid. In the year 1856 Pearson was in arrears for rent (all of which had accrued since November, 1853), and the Messrs. Reid put a distress into Pearson's house, and seized the whole of the furniture which was comprised in their bill of sale. They did not proceed to a sale under the distress, but by an arrangement with Pearson they caused a valuation of the furniture to be made, and agreed to take the amount of the valuation (£116 12*s.* 4*d.*) in part satisfaction of the arrears of rent. The plaintiff instituted the present suit, disputing the defendants' right to do this, and insisting that the value of the furniture ought to be treated as received in discharge of Pearson's previous debt, and that the plaintiff ought to be relieved, to the extent of one moiety of the value of the furniture, from his obligations as surety under the promissory note.

Palmer, Q. C., and *Bevir*, for the plaintiff.

Selwyn, Q. C., and *W. R. Ellis*, for the defendants.[2]

Sir J. ROMILLY, M. R. At present I concur in the view taken by the plaintiff of this case. I wish, however, before I give judgment, to look into the authorities, which I had to consider at some length in the case of Farebrother *v.* Wodehouse.[3]

June 9. Sir J. ROMILLY, M. R. The question which I have to decide in this case is, whether, the furniture, having been given as security for the debt for which the plaintiff was liable as surety, it was in the power of the creditor, to the injury of the surety, to seize it in discharge of another debt. I am of the opinion that it was not. It is said that this does not come within the scope of the contract between

[1] 24 Beav. 186, s. c. — ED.

[2] The arguments of counsel are omitted. — ED.

[3] 2 Jur. N. S. 1178.

Pearl v Hearon

Π was surety on note for one Pearson who had borrowed money from Δ, & had given a bill of sale to furniture to secure Δ. Rent became in arrear, & was owing to Δ's. so Δ levied a distress on same furniture as bill of sale covered, & by agreement this sum was to go in payment of rent. Π claimed it should go in discharge of the money loaned, & that he should be discharged his debt. It gave decree for Π. Π has an equity that this money should pay the 1st debt, because it was a security for the 1st debt. & Δ's have applied it to payment of a diff debt.

the surety and the creditor; but I think it is a mistake to put the rights of the surety merely on the footing of contract. In Craythorne *v.* Swinburne,[1] Lord Eldon says that it is not contract, but an equity arising out of the relation between the surety and the creditor; and in Mayhew *v.* Crickett,[2] the same doctrine was laid down. Capel *v.* Butler[3] is an express authority upon this point; but it is said that in that case there is the recital of a bond, and that there is nothing analogous in the present case. But as the plaintiff had knowledge of the fact, it is immaterial whether it was conveyed in writing or otherwise. The observations of Sir W. P. Wood, V. C., in Newton *v.* Chorlton[4] are also in point. I am of the opinion that if the defendants require payment from the plaintiff of the note, the plaintiff is entitled to say, "You must give me the securities which you hold on the furniture for this debt." What the defendants have done has been to apply the proceeds of this furniture in discharge of a totally distinct debt, contrary to the original arrangement, of which the surety was cognizant, and by which he became liable. What the defendants have received ought to be apportioned in discharge of the whole debt of £250, and the plaintiff, as surety, is liable only for a moiety of the balance. The result of holding otherwise would be this: if A advanced £1,000 on mortgage, and ten persons became sureties, each for £100, he might release or transfer the mortgage for value, and then sue each of the ten sureties for £100 each. Such a view cannot possibly be sustained. I understand there is no dispute as to the value of the furniture; and taking it at £116 12*s.* 4*d.*, an account must be taken of what is due in respect of the £250, the value of the furniture to go in part discharge, and the plaintiff to be held liable for one-half of the balance, with interest. The plaintiff must have his costs up to and including the hearing.[5]

[1] 14 Ves. 160. [2] 2 Swanst. 185. [3] 2 Sim. & S. 457. [4] 10 Hare, 646.
[5] Affirmed on appeal, 1 DeG. & J. 461.

The doctrine of the principal case that a creditor, who surrenders a security, thereby reduces *pro tanto* his claim against the surety, has been repeatedly applied. Henderson *v.* Huey, 45 Ala. 275; Hubbard *v.* Pace, 34 Ark. 80; Stallings *v.* Bank, 59 Ga. 701; Rogers *v.* Trustees, 46 Ill. 428; Kirkpatrick *v.* Howk, 80 Ill. 122; Sample *v.* Cochran, 82 Ind. 260, 84 Ind. 594; Weik *v.* Pugh, 92 Ind. 382; Port *v.* Robbins, 35 Iowa, 208; Middleton *v.* First Bank, 40 Iowa, 29; Lucas Co. *v.* Roberts, 49 Iowa, 159; Heitz *v.* Atlee, 67 Iowa, 483; Bank of Monroe *v.* Gifford, 79 Iowa, 300; Armor *v.* Amis, 4 La. An. 192; Barrow *v.* Shields, 13 La. An. 57; Union Bank *v.* Cooley, 27 La. An. 202; Cummings *v.* Little, 45 Me. 183; Baker *v.* Briggs, 8 Pick. 122; American Bank *v.* Baker, 4 Met. 164; Guild *v.* Butler, 127 Mass. 386; Willis *v.* Davis, 3 Minn. 17; Taylor *v.* Jeter, 23 Mo. 244; N. H. Bank *v.* Colcord, 15 N. H. 119 (*semble*); Bixby *v.* Barklie, 26 Hun, 275; Underhill *v.* Palmer, 10 Daly, 478; Brown *v.* Rathburn, 10 Oreg. 158; Wharton *v.* Duncan, 83 Pa. 40; Clow *v.* Derby Co., 98 Pa. 432; Otis *v.* Von Storch, 15 R. I. 41 (*semble*); Cator *v.* Berry, 14 Lea, 408; Kiam *v.* Cummings, Tex. Civ. Ap. 1896, 36 S. W. R. 770; Adams *v.* Dutton, 57 Vt. 515 (*semble*); Loop *v.* Summers, 3 Rand. 511; Price Bank *v.* McKenzie, 91 Wis. 658; Plankinton *v.* Gorman, 93 Wis. 560.

But see *contra*, Woodward *v.* Clegge, 8 Ala. 317.

The surety's liability is not affected, if he consents to the surrender of securities

PLEDGE *v.* BUSS.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., JANUARY 24, 1860.

[*Reported in Johnson*, 663.]

ROBERT PLEDGE, a retail grocer, the brother of the plaintiff, was in the year 1850 indebted to the defendant Buss, a wholesale dealer, from whom Robert Pledge was in the habit of obtaining goods; and

by the creditor. Taylor *v.* Bank of N. S. Wales, 11 App. Cas. 596; Grisard *v.* Hanson, 50 Ark. 229; Brown *v.* Abbott, 110 Ill. 162; Pence *v.* Gale, 20 Minn. 257.

Nor, if the creditor takes an equivalent security in exchange for the one given up. Thomas *v.* Cleveland, 33 Mo. 126; Lafayette Co. *v.* Hixon, 69 Mo. 581. But see N. H. Bank *v.* Colcord, 15 N. H. 119, and Neff's App., 9 W. & S. 36.

Nor, if the creditor surrenders a disputed claim as a reasonable compromise. Bedwell *v.* Gephart, 67 Iowa, 44.

Nor, if the security surrendered could not be made to realize anything for the creditor's benefit; *e. g.*, an execution upon exempt property, a lapsed life-insurance policy, and the like. Hardwick *v.* Wright, 35 Beav. 133; Rainbow *v.* Juggins, 5 Q. B. Div. 422; Lilly *v.* Roberts, 58 Ga. 363; Green *v.* Blunt, 59 Iowa, 79; Blydenburgh *v.* Bingham, 38 N. Y. 371. But the creditor must establish the worthlessness to him of the security relinquished. Moss *v.* Pettingill, 3 Minn. 217; Dunn *v.* Parsons, *infra*, 199. The Court seems to have gone too far in Comm. Bank *v.* Western Bank, 11 Ohio, 444.

Nor, if the creditor of a bankrupt exercises his option to surrender the security and prove for the whole amount of the debt. Rainbow *v.* Juggins, 5 Q. B. Div. 422.

Nor, if a judgment creditor by suing on the judgment and getting a new judgment waives the lien of the first judgment, and so lets in intermediate judgments in favor of other persons. Perry *v.* Saunders, 36 Iowa, 427.

Nor if the property surrendered was subject to a prior mortgage in favor of the surety. Stringfellow *v.* Williams, 6 Dana, 236; Glass *v.* Thompson, 9 B. Mon. 235. See Thomas *v.* Wason, 8 Colo. Ap. 452.

In Missouri the release of a part of the security does not reduce the liability of the surety, if the part retained is ample to secure the full payment of the debt. Saline Co. *v.* Buie, 65 Mo. 63.

MISCONDUCT OF CREDITOR IN DEALING WITH PROPERTY HELD AS SECURITY. If the creditor misappropriates or sells at a sacrifice, or otherwise prejudices the surety by his misconduct in dealing with the property which he received as security, the surety's liability is reduced by the amount of the damage caused by such misconduct. Allen *v.* Donald, 23 F. R. 573; Robeson *v.* Roberts, 20 Ind. 155; New England Co. *v.* Randall, 42 La. An. 260; McMullen *v.* Hinkle, 39 Miss. 142; Holliday *v.* Brown, 33 Neb. 657; City Bank *v.* Young, 43 N. H. 457; Hutchinson *v.* Woodwell, 107 Pa. 509.

In several of the cases just cited the principal debtor was in collusion with the creditor. If the creditor, in violation of his duty to the principal debtor, misappropriates or wastes the security, his claim against the principal debtor is reduced in proportion to the extent of the misappropriation or misuse. And this defence of the principal debtor enures to the advantage of the surety. In other words, the surety's relief is the same as in the cases cited in the preceding paragraph, but for an independent reason. This reason applied in the following cases: Phares *v.* Barbour, 49 Ill. 370; Nichols *v.* Burch, 128 Ind. 324; Clopton *v.* Spratt, 52 Miss. 251; Vose *v.* Florida Co., 50 N. Y. 369; Everly *v.* Rice, 20 Pa. 297; Sitgreaves *v.* Farmers' Bank, 49 Pa 359. — ED.

on the 18th of June, 1850, R. Pledge executed a mortgage to Buss to secure the then existing debt and future advances.

In October, 1850, the debt had increased, and the plaintiff, as surety, joined his brother in a promissory note to Buss for £200.

In 1854, R. Pledge became bankrupt, being then considerably indebted to Buss; and by a deed dated the 1st of August, 1857, between the assignees of R. Pledge and the defendant, the equity of redemption in the mortgaged premises was conveyed to the defendant, and in consideration thereof the defendant released the assignees and the estate of R. Pledge from all claim. The plaintiff was not consulted in this transaction, or informed of it at the time. A dividend of 6*d.* in the pound had been previously declared on R. Pledge's estate, but no proof had been made in respect of the debt to Buss.

In April, 1858, the defendant commenced an action on the note against the plaintiff, and this bill was filed praying a declaration that the plaintiff's liability as surety was avoided by the misrepresentation,[1] or, if not, then that the plaintiff was discharged in equity by the execution of the deed of 1857.

Mr. Rolt, Q. C., and *Mr. E. F. Smith*, for the plaintiff, cited Bonser *v.* Cox;[2] Lord Harberton *v.* Bennett.[3]

Mr. James, Q. C., and *Mr. Bevir*, for the defendant: —

With respect to the deed of 1857, this was not such a dealing as would discharge a surety. A surety is discharged if time is given or the nature of the debt is varied. A surety also has a right, on paying the debt, to the benefit of all securities held by the creditor; but this equity is quite distinct from that which arises out of a variation of the debt. This deed does not release the debtor or alter the nature of the debt; it merely releases all claim to prove against the estate, and cannot discharge the surety even if it gives him some right to compensation. Harberton *v.* Bennett, as reported, is founded on no intelligible principle. The surety might have paid the debt and proved himself; and at the most the only damage which he can have suffered is the loss of the sixpenny dividend, the amount of which we are willing to allow him; and we admit his right on paying the debt to have a charge upon the mortgaged premises. [They cited Browne *v.* Carr.[4]]

Vice-Chancellor Sir W. PAGE WOOD: —

The other point of the case was very ingeniously argued; but the law is now well established, that a person having a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt which he has guaranteed, to take the security in its original condition unimpaired. In this case the principal debtor having become bankrupt, the creditor, instead of going in under the bankruptcy as he might have done, and apply-

[1] So much of the case as relates to this point is omitted. — ED.

[2] 4 Beav. 379. [3] Beatt. 386. [4] 2 Russ. 600; s. c. 7 Bing. 506.

ing to have the security realized and to be admitted to prove for the balance, in effect purchased the equity of redemption (no doubt on advantageous terms), the price being the surrender of his right of proof.

The consequences of this were twofold: In the first place the surety could not get the security with the same title under which the creditor held it, which dated from 1850. This might be a matter of no small importance, having regard to the possibility of intervening judgments or other charges. All that the creditor can now give to the surety is a security taking priority from the present time. The right of the surety was to have the same security in exactly the same plight and condition in which it stood in the creditor's hands. This he cannot now get.

Again, the surety has been deprived of the benefit of proof against the bankrupt's estate. Mr. James relied on authorities which decided that a creditor did not release a surety by signing the debtor's certificate, and argued that the surety might have paid the debt and gone in and proved himself.

The decisions as to the effect of signing a bankrupt's certificate do not apply, because a debtor in giving his signature in a proper case is merely performing a duty; and if the surety does not obtain a voice in the matter himself, it is his own fault. But here no proof was made by the creditor against the principal debtor; and the estate was as a matter of bargain released from proof; and this was done without giving any notice to the surety of what was contemplated. But, apart from this, the alteration which has been made in the nature of the security is a sufficient ground for my decision.

The case before Lord Manners is quite reconcilable with the general principle. The plaintiff there came into equity upon a mortgage granted by a surety. The answer was not that the mortgage was bad, as Mr. James put it, but that it was a security for the performance of certain covenants, and that those covenants had been released; and consequently, that, if the surety paid the claim, and sought to use the name of the creditor in enforcing those covenants, he would be met by the answer that the covenants were gone. It was on that ground that the bill was dismissed.

I refer to the case of Newton *v.* Chorlton,[1] before myself, for the purpose of saying, that, although it has not been overruled, the Lords Justices have in another case intimated that they do not concur with the view which I then took. I am as much bound to submit to their opinion, as if the decision had been reversed on appeal before them. That was a case where a creditor after the contract of suretyship had obtained a security for the debt, which he afterwards parted with, and I considered that, in the absence of any authority, I could not hold that the same principle applied to after-taken securities which prevails with respect to those which exist at the date of the contract

[1] 10 Hare, 646.

Pledge v Bruce

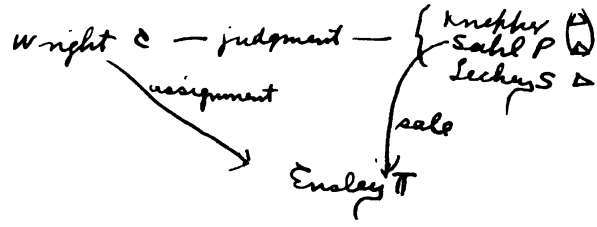
Debtor owed money to Δ, & executed mortgage to Δ to secure debt & all future advances. 4 mos later Π signed note with D as surety. 4 yrs later D became bankrupt, & assignee conveyed equity of redemption to Δ in consideration of Δ releasing assignee from all claim. Π knew nothing of transaction. Δ made no proof of claim against estate, & now Π claims he is discharged by deed of assignee. Δ sued Π at law, & Π now asks injunction. Ct held surety discharged & granted injunction. If Π pays debt he can't get security in its original condition, but only title under the deed of 1857 of assignee, & by that time there may be liens of judgments etc against it. Since S can't get the same security as D had, he is discharged.

notice Eng rule that discharge in Bkrupty does not discharge the principal from debt. He can be sued later.

+ Enaley

Wright ↑ Knepfer + Lechey

3 Δ's joined in an amicable judgment in favor of Wright, Lechey being surety. P (Sahl) owned land at this time, which was bound by lien of judgment. Sahl then sold land to Enaley T, and later Wright sold ~~the~~ judgment to Enaley. Π now sues to collect from S. It gave judgment for S Δ. Π has taken land & lien, & they both merge. So if S pays, he can't get Co right to lien on land, because there is a lien no longer. Hence S is discharged to the extent of the value of land at time T became owner.



of suretyship, the full and unimpaired benefit of which the surety is entitled to have preserved for him. But the Lords Justices have since held that the rights of a surety extend to this, that he is entitled to have every after-taken security kept intact for his benefit.[1]

The present is a much stronger case, because the security was taken at the time when the debt was contracted; but even if it had been otherwise, I should not think myself at liberty to follow Newton v. Chorlton, after the intimation of the opinion of the Lords Justices. For the present purpose, it is enough to say that I cannot enter into the question whether the security which the surety might now get, would or would not be as beneficial as the original security. He cannot have the same title or the same estate which formed the security in 1850, and the effect of this alteration in the security is, that the surety is discharged.[2]

WRIGHT, FOR USE OF ENSLEY, v. KNEPPER AND OTHERS.

IN THE SUPREME COURT, PENNSYLVANIA, SEPTEMBER TERM, 1845.

[*Reported in* 1 *Barr*, 361.]

ERROR to the Court of Common Pleas of Alleghany county.

In the Court below this was a *scire facias* to revive judgment, &c., in which Enoch Wright, for the use of Michael Ensley, the plaintiff in error, was the plaintiff, and William W. Knepper, Leopold Sahl, and William Leckey, were the defendants.

The facts of the case are these: —

Enoch Wright obtained an amicable judgment by confession, against the defendants for $618.84, which, on the 7th of July, 1841, was entered of record in Alleghany county, and became a lien on a lot of ground situate in Alleghany city, and owned by Leopold Sahl.

On the 16th of December, 1842, Leopold Sahl, for the consideration of $460, conveyed this lot to Michael Ensley.

On the 17th of June, 1844, Enoch Wright, for a *bona fide* consideration, assigned the judgment to Michael Ensley, without recourse, and subject to a credit of $200, paid 26th July, 1841, and a further credit of interest on the whole amount to April 1, 1841.

It was proved on the part of Wm. Leckey (who alone made defence to the *scire facias*), that he was only a surety, and Leopold Sahl the principal.

[1] Campbell v. Rothwell, 47 L. J. C. L. 144; Holland v. Johnson, 51 Ind. 346; Freaner v. Yingling, 37 Md. 491; Willis v. Davis, 3 Minn. 17, *Accord.* — ED.

[2] In Hereford v. Buss, 1 Rob. (La.) 212, one who had a vendor's lien upon ten slaves, repurchased nine of them from the vendee. This repurchase, it was decided, discharged the surety on the note of the original buyer for the purchase price.

The effect upon the rights of a surety of a purchase by a second creditor of the principal debtor's interest in the property pledged, was considered in Cullum v. Emanuel, 1 Ala. 23, 29; McMullen v. Hinkle, 39 Miss. 142; Wheelwright v. Depeyster, 4 Edw. Ch. 232. — ED.

The counsel of Wm. Leckey asked the Court to instruct the jury: —

That if they believed Wm. Leckey to have been the surety of Leopold Sahl in this case, that Michael Ensley being the owner of the judgment, and the owner of the lot which was bound by it; the judgment is extinguished (so far as Leckey is concerned) to the extent of the value of the lot at the time that Ensley became the owner of the judgment, and Wm. Leckey is entitled to be credited to that extent.

That if the plaintiff in a judgment becomes the owner of the land on which the judgment is a lien, the lien thereby becomes extinct by operation of law. That the assignee of the judgment in this case having received a transfer of the same, after he had purchased the property upon which the same was a lien, the judgment must be considered as satisfied to the extent of the value of the property.

The President charged the jury in accordance with the defendant's points; and further, if Wm. Leckey was a surety, the matters urged by defendants constitute a good defence to the extent of the value of the lot.

To this charge the counsel of the plaintiff excepted.

The jury found a verdict for the defendant.

The plaintiff thereupon took this writ of error, and assigned for error in this Court the directions of the Court below upon the points submitted by the counsel of the defendant.

Woods, for plaintiff in error.

Washington, *contra*, cited 7 Watts, 20; 5 Rawle, 57; 1 Watts & Serg. 156.

The opinion of the Court was delivered by ROGERS, J.

The judgment on which suit was brought was a lien on a lot now owned by Michael Ensley. Ensley became the purchaser of the judgment subsequently, and now seeks to enforce payment by means of a *scire facias* against William Leckey, the surety. This raises the question, whether the purchaser of a lot bound by a judgment against three persons, in which one of the debtors is a surety, by purchasing and taking an assignment of the judgment, discharges the surety *pro tanto*. We shall best arrive at a correct conclusion, by considering the situation of the surety before the assignment. If the creditor levies his debt by sale of the premises on which the judgment is a lien, the surety is discharged from the debt. And this, so far as the surety is concerned, would be the duty of the creditor, a duty which would be enforced by a Court of Equity, who would compel him in the first place to go against the land. But although we have no such power in this State, yet we have adopted to the fullest extent the principle, that equity considers that as done which ought to be done. Again, if the creditor levies the debt from the surety, the latter has a right to be substituted to all the securities of the principal, and by this means to an indemnity against the sale of the real property bound by the judgment. Nor has the purchaser any just right to complain, as he had constructive, if not actual notice of the lien, and of course purchased

subject to it. He takes the property incumbered with the same equities as the original owner, and as regards him it is settled; the surety upon payment of the debt is entitled to substitution against the principal. In Thorn *v.* Hartman,[1] the general principle is ruled, that if the plaintiffs in the judgment become the owners of the land upon which the judgment is a lien, the lien becomes extinct by operation of law. Of the benefit of this principle to the extent of the value of the land, the surety cannot be deprived. But by purchasing the judgment and obtaining control of it, the plaintiff seeks to levy the debt from the surety, and thereby exempt the lot, of which he has reluctantly become the owner, from the lien of the judgment. The writ was issued against all the defendants, but issue is joined, and the trial had with the surety alone; and as the jury have found the value of the lot to be equal to the amount of the judgment, we are of opinion the assignee is not entitled to have his judgment revived. A Court of Chancery would restrain him from proceeding on his judgment, and of course, according to our practice, it is equitable defence to a *scire facias*. *Judgment affirmed.*[2]

A. DUNN, Appellant, *v.* C. PARSONS, Respondent.

In the Supreme Court, New York, March Term, 1886.

[*Reported in* 40 *Hun*, 77.]

Smith, P. J. The plaintiff was sued as indorser of a promissory note made by J. Getz & Co. The defence litigated was, that the creditor had voluntarily released certain real estate belonging to the makers from the lien of a judgment which he had obtained against them on said note before suing the indorser. The real estate consisted of three parcels, one of six and $\frac{84}{100}$ acres of land in the city of Buffalo, and two in the town of Tonawanda, containing eighty-three and $\frac{89}{100}$ acres and 141 and $\frac{44}{100}$ acres of land, respectively. The claim in suit was for $5,000, and interest from June, 1872. At the trial evidence was given on the part of the plaintiff tending to show that the premises released were incumbered by prior liens to the extent of the full value of the premises. The defendant gave evidence tending to show that the premises released were of sufficient value to pay the judgment and the prior incumbrance in full.

The defendant's counsel moved the Court to direct a verdict for the defendant. The plaintiff's counsel objected, and asked the Court to submit to the jury the question whether said releases, or either of them, had in any manner injured the defendant or impaired his security; and if so, to what extent. The judge declined to submit said question to the jury, and directed the jury to render a verdict

[1] 7 Watts, 20. [2] Johnson *v.* Young, 20 W. Va. 614, *Accord.* — Ed.

for the defendant, to which refusal and direction the plaintiff's counsel duly excepted. Upon those exceptions arises the only question in the case.

The defendant was an accommodation indorser, and consequently was a mere surety for the makers of the note. And the holder of the note having obtained a judgment upon it, which became a lien upon the real estate of the makers, or one of them, the defendant, as surety, was entitled to regard the judgment and its lien as security for the principal debt, and to be subrogated in the place of the creditor in respect to the judgment and its lien, in case he paid the debt. The creditor having voluntarily released the lien of the judgment upon the real property of the principal debtor, it is now contended on the part of the defendant, as it was at the trial, that he is absolutely discharged from liability, without reference to the question whether he was actually damnified by the release, or, if damnified, to what extent. And it is claimed that there is a distinction in this respect between cases where the release is the voluntary act of the creditor and those in which it is the result of mere laches on his part.

The case of Vose *v.* The Florida Railroad Company[1] is an authority adverse to that contention. It was held in that case that a sale by a creditor of collateral securities, placed in his hands by the principal debtor, in violation of a stipulation for a particular notice of sale contained in the contract under which they were pledged, does not, *per se*, discharge a surety, *in toto*, who is liable for the debt, but by such sale the creditor makes the securities his own to the extent of discharging the surety to an amount equal to their value. Andrews, J., speaking for all the members of the Court who voted in the case, said: "The act of the creditor did not change the contract upon which Yulee was surety, and the rights of all parties will be fully protected if it shall be held that the debt was discharged to the extent of the value of the bonds sold in contravention of the contract. It is not difficult to measure the loss actually sustained by the conversion or misapplication by the creditor of the securities in his hands. It would be contrary to equity to discharge the surety *in toto*, in consequence of a release by the creditor of a security without reference to its value." And he cited the following authorities confirming this view: Story's Equity Jurisprudence, § 326; Capel *v.* Butler; Law *v.* East India Company;[2] Payne *v.* Commercial Bank of Natchez;[3] Neff's Appeal.[4]

The learned counsel for the respondent places his contention upon another ground, also, that even where a surety would ordinarily be discharged *pro tanto* only, yet, if the act of the creditor has rendered it impossible to estimate correctly what would be the value of the security affected, through the time it could be kept alive, the surety becomes absolutely discharged. He cites the case of Fielding

[1] 50 N. Y. 369.
[2] 4 Ves. 833.
[3] 6 Sm. & Marsh. 24.
[4] 9 W. & S. 36.

Hunn v Parsons

Note was made by Getz + Co, & Δ was accomodation indorser. Π got judgment against Getz & then released the lien of the judgment against certain land owned by Getz, Π now sues indorser, who claims that he is discharged. Π offered to prove that the property released was heavily incumbered, & that lien against it was of no value. Lower ct excluded this, & gave judgment for Δ. Sup ct reversed this. By sale of securities, or otherwise disposing of them, surety is released to the extent of their value only, & not entirely. Value of security released here is capable of ascertainment. & to that extent Δ is discharged. New trial ordered. Burden on Π to show that property was not worth anything.

Fuller v Torrinson

Π was seller of certain property, for which buyer gave note, guaranteed by Δ's. Condition of sale was that machines should remain property of Π's until price was paid, & that Π's could sell machines at any time giving makers credit on note; plea averred all this, & that the Π neglected to take possession of the machines, & that makers had since become insolvent, & machines had become vested in bankrupt estate. Demurrer. Ct sustained demurrer. Π's rt against surety is not lost by mere neglect in enforcing security.

v. Waterhouse.[1] That was not the case of a discharge of a particular piece of property from the lien of a judgment, but the judgment itself was discharged, and the decision proceeded on the idea that it was impossible to say what would have been its value if it had been kept alive. Here, however, the value of the real estate discharged was capable of being ascertained. We think, therefore, the direction to render a verdict for the defendant cannot be sustained, and that there must be a new trial. For the purposes of the new trial we hold that it is incumbent on the plaintiff to show clearly that the property released could not have been made available at all, or not beyond a certain amount, to the payment of the judgment on the note by reason of the prior incumbrances, and to the extent of the value of the part released, the surety is discharged.[2] Holt v. Bodey.[3]

Judgment reversed, and new trial ordered, costs to abide event.

BARKER and BRADLEY, JJ., concurred; HAIGHT, J., not sitting.

Judgment reversed, and new trial ordered, costs to abide event.[4]

[1] 40 N. Y. Supr. Ct. 424.

[2] Neff's Ap., 9 W. & S. 36, 43–44; Holt v. Bodey, 18 Pa. 207, *Accord.* — ED.

[3] 18 Pa. St. 207.

[4] If a creditor, having obtained, by legal process, a lien upon the property of the principal debtor, relinquishes it, his claim against the surety is thereby reduced to the extent of the lien given up.

Judgment Lien. Jones v. Hawkins, 60 Pa. 52; First Bank v. Parsons, 42 W. Va. 137; Mellish v. Green, 5 Grant Ch. 655.

Execution Lien. Mayhew v. Crickett, 2 Sw. 185; Wils. Ch. 418, s. c.; State Bank v. Edwards, 20 Ala. 512; Winston v. Yeargin, 50 Ala. 340; Morley v. Dickinson, 12 Cal. 561; Mulford v. Estudillo, 23 Cal. 94; Thomas v. Wason, 8 Colo. Ap. 452; Houston v. Hurley, 2 Del. Ch. 247; Curan v. Colbert, 3 Ga. 239; Brown v. Riggins, 3 Ga. 405; Lumsden v. Leonard, 55 Ga. 374; Fleming v. Odurn, 59 Ga. 362; Rawson v. Gregory, 59 Ga. 733; Brinton v. Gerry, 7 Ill. Ap. 238; Sterne v. Vincennes Bank, 79 Ind. 549; Sherraden v. Parker, 24 Iowa, 28; Green v. Blunt, 59 Iowa, 79; Alexander v. Bank, 7 J. J. Marsh. 580; Comstock v. Creon, 1 Rob. La. 528; Springer v. Toothaker, 43 Me. 381; Chipman v. Todd, 60 Me. 282, 284; Moss v. Pettingill, 3 Minn. 217; Davis v. Mikell, Freem. Ch. (Miss.) 548; Brown v. Kidd, 34 Miss. 291; Ferguson v. Turner, 7 Mo. 497; Mo. Bank v. Watson, 24 Mo. 333; Priest v. Watson, 75 Mo. 110; Bronson v. McCormick Co. (Neb. 1897), 72 N. W. R. 312; Cooper v. Wilcox, 2 Dev. & B. Eq. 90; Nelson v. Williams, 2 Dev. & B. Eq. 118; Smith v. McLeod, 3 Ired. Eq. 390; Dixon v. Ewing, 3 Ohio, 280; Day v. Ramey, 40 Oh. St. 446; Commw. v. Miller, 8 S. & R. 452; Commw. v. Haas, 16 S. & R. 252; Bank v. Fordyce, 9 Pa. 275; Holt v. Bodey, 18 Pa. 207; Templeton v. Shapley, 107 Pa. 370; Finley v. King, 1 Head, 123; Watson v. Read, 1 Tenn. Ch. 196; Parker v. Nations, 33 Tex. 210; Jenkins v. McNeese, 34 Tex. 189; Baird v. Rice, 1 Call, 18; Shannon v. McMullin, 25 Grat. 211 (*semble*); Johnson v. Young, 20 W. Va. 614; McKenzie v. Wiley, 27 W. Va. 658; Hyde v. Rogers, 59 Wis. 154; Spencer v. Thompson, 6 Ir. C. L. R. 537.

Attachment Lien. Maquoketa v. Willey, 35 Iowa, 323; Mo. Bank v. Matson, 24 Mo. 333; Spring v. George, 50 Hun, 227; Twiggs v. Augusta Bank, 26 S. Ca. 612; Ashby v. Smith, 9 Leigh, 164.

But see *contra*, Glazier v. Douglass, 32 Conn. 393, 400 (*semble*); Concord Bank v. Rogers, 16 N. H. 9; Baker v. Davis, 22 N. H. 37; Barney v. Clark, 46 N. H. 514; Morrison v. Citizens' Bank, 65 N. H. 253; Montpelier Bank v. Dixon, 4 Vt. 587; Baker v. Marshall, 16 Vt. 522.

Suspension of Seizure of Goods after Execution issued. In most jurisdictions a judg-

FULLER AND ANOTHER v. TOMLINSON BROTHERS.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1882.

[*Reported in* 58 *Iowa Reports*, 111.]

THIS action was brought against the defendants as guarantors of certain promissory notes. The defendants for answer averred that the notes were given for the purchase price of property belonging to the plaintiffs; that they contained conditions and stipulations, in substance, that the property sold, and for which the notes were given, should remain the property of the plaintiffs until the notes were fully paid; that the plaintiffs should have the power at any time even before maturity of the notes to sell the property at private sale, giving the makers credit for the net proceeds realized; that at the time the notes were turned over by the defendants to the plaintiffs, and guaranteed by the defendants, the makers of the notes still held possession of the property for which the notes were given; that it was of great value and formed good security for the notes; that the plaintiffs neglected and refused to take possession of the property, and sell the same, and apply the proceeds in payment of the notes; that the plaintiffs had the exclusive right to control the security; that the makers of the notes have become insolvent, and the notes have become uncollectible through the negligence of the plaintiffs in not availing themselves of the securities.

To the answer the plaintiffs demurred, and the Court sustained the demurrer. The defendants appeal.[1]

D. W. Poindexter, for appellants.

Cleland & Eaton, for appellees.

ADAMS, J. The defendants claim that the plaintiffs had what was equivalent to a lien upon the machines for which the notes were given. This the plaintiffs deny. But for the purposes of the opinion this may be conceded. The first question presented then is, whether the failure

ment creditor does not acquire a lien upon the chattels of his debtor until they are seized under the writ of execution. Accordingly a judgment creditor does not lose any right against the surety, if the officer, by his direction, fails to seize the goods of the principal debtor, or returns the execution without any levy. Such voluntary indulgence, without a binding agreement to hold back or abandon the execution, is no more prejudicial to the creditor than voluntary forbearance to begin an action against the debtor. Summerhill *v.* Tapp, 52 Ala. 227; Crawford *v.* Gaulden, 33 Ga. 173; Jerauld *v.* Tippet, 62 Ind. 122; Union Bank *v.* Govan, 18 Miss. 333; Smith *v.* Erwin, 77 N. Y. 466; Thornton *v.* Thornton, 63 N. Ca. 211; Farmers' Bank *v.* Raynolds, 13 Ohio, 85; Morrison *v.* Hartman, 14 Pa. 55; McNeilly *v.* Cooksey, 2 Lea, 39; Humphrey *v.* Hitt, 6 Grat. 509; Knight *v.* Charter, 22 W. Va. 422.

In a few jurisdictions the execution is a lien as soon as the writ is delivered to the officer, and in these States the return of the execution without levy, being a discharge of the lien, has the same effect upon the creditor's right against the surety as the surrender of any other security. Sterne *v.* Vincennes Bank, 79 Ind. 549; Sterne *v.* McKinney, 79 Ind. 578; Dills *v.* Cecil, 4 Bush, 579; Ferguson *v.* Turner, 7 Mo. 497. — ED.

[1] The statement of the case has been slightly abridged. — ED.

of the plaintiffs to take possession of the machines, and subject them to the payment of their debt, until it was too late to do so, constitutes any defence. In support of the defendants' proposition, that it does, our attention is called to the "familiar doctrine, that the surrender of any security by a creditor, held at the time a third person becomes surety for, or guarantor of, the debt will effect a *pro tanto* discharge of the surety or guarantor." 2 Daniel on Negotiable Instruments, sec. 1789; 1 Parsons on Bills and Notes, 242. Where such a surety or guarantor pays a debt, he is entitled to be subrogated to all the securities which the creditor had in his hands. A surrender of securities, therefore, is a direct impairment of the surety's or guarantor's rights. But the case before us is not one of the surrender of securities. The plaintiffs are charged simply with negligence, and in our opinion the defendants' position is not tenable. It may be conceded that if the plaintiffs had taken the machines into their possession, and while charged with responsibility for their proper custody and disposition, they had negligently allowed the machines to become impaired or destroyed, such negligence would have had the effect to discharge the defendants *pro tanto*. Day *v.* Elmore.[1] But such case is not before us. We have a case where the holder of paper, who has a lien upon personal property for security, but is charged with no responsibility for its custody or care, fails to enforce his lien and the security is lost. We have seen no case which goes to the extent of holding that such failure can be set up in defence by a surety or guarantor, nor do we think that such is the law. If the surety or guarantor apprehends that the security will be lost, it is his privilege to pay the debt and enforce the lien himself.

In our opinion the demurrer to the defendant's answer was properly sustained. *Affirmed.*[2]

[1] 4 Wis. 214.

[2] The surety is not, in general, relieved by the creditor's loss of collateral security by his mere inactivity; *e. g.*, by failure to foreclose a mortgage or to take possession. Grisward *v.* Hinson, 50 Ark. 229; Freaner *v.* Yingling, 37 Md. 491; Clopton *v.* Spratt, 52 Miss. 251; Sheldon *v.* Williams, 11 Neb. 272; Schroeppell *v.* Shaw, 3 N. Y. 446; Howe Co. *v.* Farrington, 82 N. Y. 121; Day *v.* Elmore, 4 Wis. 190.

By suffering a judgment lien to expire. U. S. *v.* Simpson, 3 Pen. & W. 439; Mundorff *v.* Singer, 5 Watts, 172; Kindt's App., 102 Pa. 441.

By making no effort to protect a second mortgage from being cut off by a foreclosure of the first mortgage. Vance *v.* English, 78 Ind. 80; Wasson *v.* Hodshire, 108 Ind. 26.

By a failure to sell a depreciating security. Brick *v.* Freehold Co., 37 N. J. 307; Cherry *v.* Miller, 7 Lea, 305. But see Harrison Works *v.* Templeton, 82 Tex 443. — Ed.

CAPEL *v.* BUTLER.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., DECEMBER 17, 1825.

[*Reported in* 2 *Simons & Stuart*, 457.]

ONE White and the plaintiff, by their bond in writing became jointly and severally bound to Butler in the penalty of £3,000 for securing the due payment of an annuity. White covenanted with Butler to pay him the annuity during the lives of himself and three other persons; and he demised to Pruen certain hereditaments for the remainder of a term of 1,000 years; and he also assigned to Pruen two trows or vessels called "The William of Gloucester" and "The Endeavour," and likewise a policy of assurance upon the life of White, upon trust, upon default in payment of the annuity, to sell all or any of the trust premises, to pay out of the proceeds the arrears of the annuity, to invest the surplus in his name, and, out of the yearly proceeds thereof, to keep down the annuity, and subject thereto to stand possessed of the capital in trust for White. The annuity was to cease if at any time White should pay Butler all arrears thereof and also £1,500 as the consideration for its repurchase.

On the 9th of April, 1821, a commission of bankrupt issued against White, under which he was found a bankrupt; and the plaintiff and one Payne were chosen his assignees.

The annuity being in arrear, Butler brought an action against the plaintiff on the bond.

The bill, after stating these facts, alleged that the plaintiff had discovered, since White's bankruptcy, that Butler and Pruen had neglected to perfect the assignment of the trows or vessels according to the forms and in the mode required by the several acts of Parliament for the registry of ships or vessels, and the transfer of property therein; and that White had disposed of the trows or vessels and applied the proceeds to his own use, whereby the security for the regular payment of the annuity had been very much diminished; that the rents of the leasehold premises were not sufficient to answer the growing payments of the annuity, whereas the earnings of the vessels, together with the rents, were, when the plaintiff entered into the bond, and would still be, if the vessels had not been sold, sufficient for that purpose.

The bill prayed for an injunction to restrain the action; that the bond might be declared void in respect of the defendants not having rendered the assignment of the trows an effective assignment; and that the plaintiff might be decreed to be entitled to repurchase the annuity on payment of the £1,500, and £35 (being one quarter of a year of the said annuity) less the value of the trows or vessels.[1]

[1] The statement of the case is abridged and the argument of the plaintiff is omitted. — ED.

Capel v Butler

Bond made by Capel & White to secure payment of annuity to Butler, White being P's Capel securityx. White was to transfer certain leaseholds & two sloops to one Prior as trustee for the annuity, annuity to cease if White should pay Butler a certain sum. Bill alleged that Butler & Prior had neglected to see that vessels were properly assigned under Act, & Δ alleged that they acted in this way under advice of Counsel, & that Π had notice of this x Bill asked injunction to restrain an action being brot by Butler against Capel, & granted injunction. Butler has been negligent, & by reason of this has lost certain value of security to slowly & S can deduct this from amt he wants to pay to settle up the annuity.

Butler and Pruen admitted, in their answer, that they did not cause any indorsement or memorandum of the assignment of the trows or vessels to be entered on the register of the trows or vessels, by reason of the counsel, who prepared the securities for the annuity, having advised them that no such memorandum or indorsement was necessary, and that the trows were not within the Registry Act, because, amongst other reasons, they were not employed, as he considered, for any purpose beyond inland navigation on a river, the trows only trading between Bristol and Gloucester, on the rivers Severn and Avon; and they submitted that the plaintiff had notice of the nature of the assignment or conveyance which White had executed to them of the trows or vessels, and that the same were only secured or assigned to them by the indenture of July, 1820, and not by a bargain and sale and indorsement on the registry of the trows or vessels, inasmuch as the bond executed by the plaintiff referred to, and in part recited, the indenture of assignment of July, 1820.

Mr. Fonblanque and *Mr. Romilly*, for the plaintiffs.

Mr. Sugden and *Mr. Lynch*, for the defendants, Butler and Pruen. Securities have failed before, but such an equity as the present one has never been claimed till now. There is no such rule as that the grantee of an annuity is bound to see that all the securities for it are valid. The circumstance of there being a surety relieves the grantee from the necessity of ascertaining whether the securities are good or not. The contract is between the grantee and the parties who are to give him the securities. The latter are all grantors; the former, the grantee. Suppose the title to the leaseholds were bad, and the equity contended for by the plaintiff were to prevail, the very instant that the necessity for a surety arose, he would say he was discharged. If he had intended to rely on the securities, he was bound to see that they were valid. A surety is entitled to stand in the place of the creditor; but here he asks to be placed in a better situation. How can it be said that the defendants did not use due diligence, when it appears that they took the opinion of counsel, who advised them that the assignment was valid? It has often been decided that, where a solicitor acts under the advice of counsel, he is discharged from all responsibility. This has often been held when actions have been brought against solicitors for the defects in the memorials of annuities. Under these circumstances it is impossible to say the loss is to fall upon the defendants.

The Vice-Chancellor was of opinion that the plaintiff, as surety, was entitled to take advantage of the proviso for redemption; and that, the value of the two vessels being lost to him, by the neglect of the defendant Butler, he was entitled to deduct that value from the stipulated price of redemption.[1]

[1] Watson *v.* Alcock, 1 Sm. & G. 319, 4 D., M. & G. 242; Strange *v.* Fooks, 4 Giff. 408 (failure to notify trustee of the principal's assignment of the trust); Wulff *v.* Jay, L. R. 7 Q. B. 756; Sullivan *v.* State, 59 Ark. 47; Toomer *v.* Dickerson, 97 Ga. 428; Nance *v.* Winship Co. (Georgia, 1895), 21 S. E. R. 901; State Bank *v.* Bartle, 114 Mo. 276; Burr *v.* Boyer, 2 Neb. 265; Schroeppell *v.* Shaw, 3 N. Y. 446,

COATES v. COATES.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., January 14, 1864.

[*Reported in* 33 *Beavan*, 249.]

IN 1836, the testator, Benjamin Coates, lent John Green £1,000 on the joint promissory note of John Green and William Green, payable six months after date, but William Green joined in the note as surety only. The testator afterwards, in 1838, lent John Green a further sum of £1,000 on his several promissory notes.

In 1839, John Green deposited with the testator a policy of assurance for £2,000 upon his own life as a further security for both debts.

The testator died in 1843. In 1845 John Green became bankrupt, and in 1846 the testator's two executrixes surrendered the policy to the Rock Office in consideration of £97 10*s*. William Green stated "that he was no party to the surrender of such policy, and did not consent thereto, and was not consulted upon the subject previous to such surrender." The executrixes proved against the estate of John Green in the bankruptcy for £1,500, the balance due on the two notes, and they afterwards received a dividend of £97 upon their proof.[1]

THE MASTER OF THE ROLLS. I think that the surrender of the policy cannot be treated as a discharge of the surety. John Green was a bankrupt, and it was not probable that he would keep up the policy, from which he could derive no benefit, and the executrixes were not bound to do so. To keep it up would have been a mere speculation on their part, which might or might not have turned out beneficial, and if it had turned out unfavorable, might have been complained of by the surety. They realized what they could by surrendering it to the office, and whether the policy was surrendered before or after the proof in bankruptcy, I think it did not release the surety. It was the duty of the creditor to sell and to realize the security; by so doing, he alone could make the estate of the principal debtor available for the payment of a dividend on the debt for which the surety was liable, and consequently the benefit of which dividend is obtained by the surety in further discharge of his debt.

457 (*semble*); Teaff *v.* Ross, 1 Ohio St. 469 (compare Coombs *v.* Parke, 17 Ohio, 289); Allentown Bank *v.* Troxler, 174 Pa. 497 (*semble*), *Accord*.

Philbrooks *v.* McEwen, 29 Ind. 347; New York Bank *v.* Jones, 9 Daly, 248, 250–251 (*semble*); Hampton *v.* Levy, 1 McC. Ch. 107; Lang *v.* Brevard, 3 Strob. Eq. 59, *Contra*.

See Jephson *v.* Maunsell, 10 Ir. Eq. R. 38, 132; Pickens *v.* Finney, 20 Miss. 468.

If a creditor holds collateral security in the form of a chose in action, and negligently fails to collect it, the surety is discharged to the extent of the loss due to the creditor's negligence. Fennell *v.* McGowan, 58 Miss. 261; City Bank *v.* Young, 43 N. H. 457, 462 (failure to give notice of dishonor to an indorser); Kemmerer *v.* Wilson, 31 Pa. 110; Shippen *v.* Clapp, 36 Pa. 89. — ED.

[1] The arguments of counsel are omitted and also so much of the case as does not relate to suretyship. — ED.

Coates v Coates

T estator loaned money to J. Green, & took note wherein W. Green joined as security. J Green gave life policy to testator to secure him. J Green became bankrupt, & then testator's executors sold policy to Co, W Green having no knowledge of this. Ex's then moved against estate of J Green & recd divds & now want balance paid by W. Green. Held S not discharged. Creditor realized what he could on security which was of speculative value, & it was creditors duty to realize what he could, & this goes in discharge of S's obligation, as does divd recd.

Upon the authority of Pearl v. Deacon, which was affirmed, 1 must also hold that £97 10*s*., which was the produce of a collateral security for both debts, ought to be set off ratably against the amount due on the two notes, on one of which William Green was liable as surety.

The result will be that one-half of the £1,500, or £750, will be the amount due from William Green, and from this must be deducted one-half of the £97 received for dividends, and one-half of the £97 10*s*. received in respect of the produce of the policy. This will leave a sum of £652 15*s*., as the balance of the debt due from William Green, to be deducted from his legacy of £1,000, and will leave £347 5*s*. due to him.[1]

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amt to 216 Lea.

POLAK AND ANOTHER v. EVERETT.

IN THE COURT OF APPEAL, FEBRUARY 10, MAY 2, 1876.

[*Reported in Law Reports*, 1 *Queen's Bench Division*, 669.]

THIS was an action on a guarantee entered into under the following circumstances: —

The plaintiffs are wine merchants carrying on business in the city of London, and the defendant is a discount broker in business in the same city.

In 1873, one Etienne Nazarkiewich had arranged to dispose of his business as a wine merchant to a limited liability company, to be called E. Nazarkiewich & Co. (Limited).

At that time he was indebted to the plaintiffs in a sum of £8,400; and on the 20th of December, 1873, it was agreed between them that that amount should be liquidated in the following manner: £2,400 was to be paid by Nazarkiewich to the plaintiffs on or before the 15th of February, 1874; and £6,000 was to be paid in fully paid-up shares or share warrants in "E. Nazarkiewich & Co." within three days after the first allotment of shares in that company, which Nazarkiewich was to redeem at par within twelve calendar months from the 1st of January, 1874; and the redemption was to be guaranteed by the defendant.

It was also agreed that the book-debts of Nazarkiewich should be collected by one Vispé on behalf of Messrs. Tampier, of Bordeaux, and the plaintiffs, to be equally divided between them as collected; the amount paid to the plaintiffs being applied towards the redemption of the £6,000 of shares.

On the same day the defendant signed a written guarantee to the plaintiffs for the fulfilment by Nazarkiewich of the above agreement "so far only as concerns the full redemption of the shares and share

[1] See Rainbow v. Juggin, 5 Q. B. Div. 422, 424, per Bramwell, L. J. — ED.

warrants therein mentioned of the value of £6,000 on or before the 1st day of January, 1875."

The first allotment of shares in "E. Nazarkiewich & Co." took place on the 18th of February, 1874, but the £6,000 worth of shares was not transferred by Nazarkiewich to the plaintiffs within three days after that event.

In May and June, 1874, negotiations were carried on between the plaintiffs, Nazarkiewich, and a Mr. Asser, one of the directors of E. Nazarkiewich & Co., for the repurchase by Nazarkiewich of the plaintiffs' share of his book-debts, and the transfer of them by him over to the company, and on the 1st of July, 1874, the plaintiffs gave a receipt to Nazarkiewich for fifteen fully paid-up shares in the company of £250 each, four acceptances for £250 each of the company dated the 26th of June, 1874, at thirty days, four months, six months, and nine months respectively, and £190 in cash, "in part discharge of our claim of £6,000, and provided the above bills are paid at maturity, we agree to release our charge or interest in the book-debts of Mr. Nazarkiewich."

The defendant was the chairman of the company, but he did not agree to the repurchase and transfer to the company of Nazarkiewich's book-debts.

The declaration in the first count set out the agreement of the 20th of December, 1873, between the plaintiffs and Nazarkiewich, and the guarantee of the defendant to the plaintiffs of the same date, and averred that Nazarkiewich had caused shares in the company to the nominal value of £3,750 to be issued to the plaintiffs, and that they had not been redeemed.

The defendant pleaded, seventhly, upon equitable grounds, that the defendant was discharged by the agreement between the plaintiffs and Nazarkiewich for the transfer by the plaintiffs of their interest in his book-debts to the company; and, eighthly, upon equitable grounds, that the defendant was discharged by the material variation without his knowledge of the terms of the agreement set out in the declaration.

Issue, and demurrer and joinder to the seventh and eighth pleas.

At the trial before Denman, J., the facts above set out were proved, and a verdict for the plaintiffs was taken by consent for the damages in the declaration, with leave to the defendant to move to enter it for him, or to reduce the damages to such sum as the Court might direct; the Court to draw all necessary inferences of fact.[1]

McIntyre, Q. C., and J. *C. Mathew*, in support of the motion, were stopped.

Philbrick, Q. C., and *R. E. Webster* showed cause.

BLACKBURN, J. We think that the defendant is entitled to judgment, on the ground that what has taken place has discharged him as a surety.

[1] The statement of the case is taken from 24 W. R. 365. The argument for the plaintiffs and the concurring opinions of Mellor and Quain, JJ., are omitted. — ED.

One E.N. owed debt to T. He was about to form a Co. E.N. & Co, & agreement was made with T. whereby in satisfaction of T's debt, shares to the amt of £6,000 were to be issued to him. Book debts of E.N. were to be collected by a 3d person for benefit of another person & T equally, amt of collections to be applied to redemption of shares. D was a guarantor for the redemption of the shares issued to T. Certain shares were issued to T. Then E.N. wished to buy back his book debts, & T & E.N. made agreement to do this & accepted bills for accomodation of E.N., provided they were discharged at maturity. T's sue for shares not redeemed. & D's pleaded a discharge in full by reason of the agreement to transfer the interest in the book debts. Judgment for T below.

Upper ct gave judgment for D. [D was chairman of Board of E.N. & Co & knew of agreement to transfer book debts, but did nothing]. S cant be held to have assented by mere silence unless there is a duty to speak, & there was no such duty here. Creditor here has sold all his security, & if S. does pay, he wont have any security to which to be subrogated. It makes no difference that security is admittedly less than debt guaranteed; S is entitled to the full security what ever it is. Reason seems to be the desirability of avoiding disputes whether transaction is for S's benefit or not.

notes that S is held to be totally discharged.

C held book-debts of P as pledge security. He released them without S's consent. They were worth less than debt.

Held: S is discharged

Now, first, upon the leave reserved, with power for the Court to draw inferences of fact, we must take it to be the fact that though the defendant was well aware of this release being executed, he was not an assenting party to it. Then it is argued that knowledge on the part of the surety that there is going to be a release of a part of the security is enough without assent. I cannot see any authority for that.

In Pickard v. Sears [1] it was held that he who stands by and sees another alter his position on the faith of a fact which he can contradict, cannot afterwards take advantage of that alteration. But the rule was corrected in Freeman v. Cooke,[2] where it was said that if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise, there is a duty to speak, his silence would preclude him as much as if he proposed the act himself. But to say that a person, who, being a surety, becomes aware that the creditor is going to give time or do something else which, if done without his assent, may discharge him, is bound to warn the creditor against doing it, is a thing for which no authority whatever has been cited. That brings us to the question whether what was done in this case did, upon the established principles of equity, discharge the surety.

It has been established for a very long time, beginning with Rees v. Berrington [3] to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor; and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in Samuell v. Howarth, by Lord Eldon, is because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: "The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." The principle being, as I understand it, that as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or a just principle originally, is a matter which it is far too late to think about now. I

[1] 6 Ad. & E. 469, 474. [2] 2 Ex. 654. [3] 2 Ves. 540.

must own I have had considerable doubts about the justice of that principle, but from the time of Rees v. Berrington[1] it has been undisputed law, and nothing but the legislature can interfere to alter it.

Now, in the present case the interference with the rights of the surety is not by giving time to the debtor, but it is equally as great an interference. The surety at the time he entered into the suretyship had a right to have these book-debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book-debts to the person collecting them. That equitable right has been taken away by his wilful act, and in Mayhew v. Crickett,[2] upon this very question, Lord Eldon says: "When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him, You have discharged the surety from whom I ought to have compelled contribution, either in my own name in equity, or using your name at law." Lord Eldon is speaking here of withdrawing execution on a judgment; the precise amount does not appear, and it was possibly very small; but it was held that the creditor having done this did discharge the surety, on a view which, according to Lord Eldon, is obvious in law and equity.

Now, admitting this to be so, it has been argued by counsel for the plaintiffs that there is a distinction to be taken to this extent, as I understand their argument. The debt here secured — for it is really the same thing as if the debt were secured — is £6,000. Half of the book-debts only were pledged as an equitable security for this amount, and they were a security for every portion of the £6,000, but if they paid 20*s.* in the pound they would only produce £4,000, so that there would be some £2,000 which would still remain for which the surety would have been liable; and the argument is that the interference with the rights of the surety in respect to a matter which, though a security for the whole debt, is of less value than the whole debt, does not come within the principle and the authorities. As far as the authorities go, none were cited in which that distinction was taken. There does not seem to be the least authority for it on principle, once concede the rule that where the creditor wilfully interferes with the rights of the surety and alters the equitable rights which he had acquired, alters them, even though it may be for the surety's benefit, — without the surety's assent, the surety is discharged. And it seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt. There are two or three distinctions to be taken notice of. For instance, there is Wulff v. Jay,[3] — and that case was perfectly rightly decided, — where a person is a creditor with a pledge or surety he is in equity bound to account not only for the money he has actually made out of the pledge, but also for the moneys he might, ought, and should have made out of the pledge, and he must allow for that whether he made

[1] 2 Ves. 540. [2] 2 Sw. 185, 193. [3] Law Rep. 7 Q. B. 756.

them or not, and if by laches he has diminished the value of the pledge he is bound to allow for the sum he ought to have made. But his laches does not discharge the surety, for it does not come within the principle which applies where the surety's rights have been changed or varied. His rights remain as before. The case seems to be like the case where the creditor does not choose to sue the debtor. That does not discharge the surety, for the surety's right remains untouched. So in the case where there is a failure to make the most he could of the pledge, that does not in the slightest degree discharge the surety, though the amount which ought to have been recovered by making a proper use of it is to be allowed in reduction of the debt. In the present case it is not a question of laches, or not making the best of the pledge that could be made, but it is a case of preventing the surety having any recourse against these book-debts at all. There are other cases, but I do not think it is necessary to go into them. There is a distinction made in equity between those rights of the surety which he acquired at the time when he entered into the suretyship, such as securities the creditor then held, and other rights, and he has a right to all those; and Mayhew *v.* Crickett [1] establishes, if that security is destroyed, the debt is gone. There are other cases which turn upon this. After the security is established, the surety has a right to have the benefit of new securities; but those not being a part of the original right, it is a different question whether the dealing with those would discharge the surety. The present case does not come within that principle. Taking it as it stands here, it seems to me that the defence is made out, and consequently that the defendant should have judgment.

On appeal,

The Court (JESSEL, M. R., KELLY, C. B., MELLISH, L. J., and DENMAN, J.) had no doubt that the view taken by the Queen's Bench Division was correct, and affirmed the judgment for the same reasons.

Judgment affirmed.

JOB WILBUR *v.* H. W. WILLIAMS.

IN THE SUPREME COURT, RHODE ISLAND, JUNE 16, 1888.

[*Reported in* 16 *Rhode Island Reports*, 242.]

DEFENDANT'S petition for a new trial.

PER CURIAM. This is assumpsit on a check for eighty dollars drawn by the defendant on the Traders' National Bank in favor of H. J. Robinson, and by him indorsed to the plaintiff. The action was begun in the District Court, taken by appeal to the Court of Common Pleas, where, upon trial by the Court, jury trial being waived, judgment was entered for the plaintiff. The case comes before us on petition for new trial on the ground that the judgment was against the evidence.

[1] 2 Sw. 193.

The facts as they appeared in evidence were as follows, viz.: the understanding between the plaintiff and Robinson, when the plaintiff took the check, was that he should keep it for fifteen days. He did so keep it, and then presented it to the bank, which refused to pay it. He thereupon gave notice to the defendant and demanded payment from him. The bank then was, and still is, solvent. Robinson had absconded the day before the check was presented, leaving many questionable transactions behind. Robinson, when he ran away, had household furniture worth about twenty-five hundred dollars, on which the plaintiff held an unrecorded mortgage as security for Robinson's general indebtedness to him, including said check, which he had recorded immediately afterwards. The check had been given by the defendant to Robinson for his accommodation, on his representation that he had a friend who would put it in his drawer as cash, and that in a day or so he, Robinson, would redeem it. Robinson told the defendant, a day or two afterwards, that he had taken the check up and destroyed it.

The defendant claims that he was discharged by the delay to present the check for payment. He does not claim to be discharged by reason of any failure of the bank, but on the ground that, if the check had been immediately presented, and he had had notice of the non-payment, he could have secured himself by paying the plaintiff and attaching the furniture, the mortgage upon which was then unrecorded, or by arresting Robinson. It is, however, entirely uncertain whether, if the check had been earlier presented and payment refused, the plaintiff would not have had the mortgage earlier recorded, or whether, in such event, Robinson would not earlier have run away, and so avoided arrest. If the defendant was entitled to claim discharge on the ground of delay, for these reasons we think the question whether he was injured by the delay must be regarded as purely a question of fact, and we are not satisfied that the judgment was against the evidence on that point.

It also appeared in evidence that, after the present action was begun, the plaintiff transferred his mortgage on Robinson's furniture, for two hundred twenty-five or two hundred fifty dollars, to Robinson's father, the plaintiff never having previously had possession of the mortgaged property. The defendant claims that, as accommodation drawer of the check, he was entitled to the privileges of a surety, the circumstances in which the plaintiff received the check being such as to give him notice of his relation to the drawee, and that he is therefore discharged by the transfer of the mortgage, under the decision of this Court in Otis *v.* Von Storch;[1] but in Otis *v.* Von Storch the Court held that a surety will be discharged if the creditor surrenders or releases a security for the debts taken from the principal debtor to such debtor. That is not this case, for here there was no surrender of the security to the principal debtor, but only a transfer of it to a third person. Such a

[1] 15 R. I. 41, 42.

Sect 186:— A C/ must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay" x

Wilbur v Williams.

Holder of ck v drawer. Δ drew it as accomodation drawer for one Robinson. Robinson indorsed ck to Π, who was to hold it for 15 days, & then collect it. Robinson then gave a mortgage on household goods to Π as security for genl indebtedness. Π then presented ck to Bk & Δ for payment, & it was refused. Robinson meanwhile had run away, & Π had, after beginning this suit, transfered mortgage to Robinson's father, taking money for it. Δ claims a discharge by reason of the delay, & by reason of the transfer of the mortgage. Judgment for Π below, & petition for a new trial.

Ct dismissed petition. Π do not discharged by reason of delay, for it does not appear that loss to Δ would have been any the less, had payment been demanded sooner. Transfer of mortgage does not discharge Δ, because Π is proper party to seek to enforce this debt, since it is an assignment of debt along with mortgage, & suit must be in assignors name & it does not appear that this was being prosecuted against will of assignor.

" Plea put in after issue joined, for purpose of introducing new matter & coming to knowledge of party subsequently to joinder " Bouvier P. 794

Indorsee v maker, 2d & 3d indorsers. All Δ's pleaded genl issue & then interposed defense that Π had discharged payee by release under seal. Π demurred. Ct gave judgment for Δ's. [illegible] Π appeals.

to [illegible] to have security or actions. First indorser was sued merely, Π claimed had waived it in fact.

transfer will not discharge a surety.[1] Wheatley v. Bastow;[2] De Colyar on Guaranties, 440, 441. Such a transfer of a mortgage operates also as a transfer of the debt secured by it. Jones v. Huggeford;[3] Campbell v. Birch.[4] And the question might arise, whether, after such a transfer, the plaintiff would be entitled to continue to prosecute the action. There was, however, no evidence to show that he was prosecuting it in fraud or against the will of the assignee. In the absence of such testimony the assignor is allowed to go on. Alsop v. Caines;[5] Raymond v. Johnson;[6] Gardner v. Smith.[7] If it be the fact that the plaintiff is prosecuting the suit for himself, in violation of the rights of his assignee, the matter can be brought before the Court below by motion for a stay of execution, or other appropriate proceeding.

Petition dismissed with costs.

Simon S. Lapham, for plaintiff.
William H. Sweetland, for defendant.

NEWCOMB v. RAYNOR AND OTHERS.

IN THE SUPREME COURT, NEW YORK, MAY, 1839.

[*Reported in* 21 *Wendell*, 108.]

RELEASE of parties. The plaintiff declared in assumpsit on the money counts against Richard Raynor, Willett Raynor, and Josiah Wright, attaching to the declaration a copy of a promissory note, with notice that the same would be given in evidence under the money counts according to the statute. The note, of which a copy was given, purported to be made by Richard Raynor for $500, payable to Charles Goings or order, and indorsed by the payee, and by Willett Raynor and Josiah Wright. The defendants pleaded the general issue, and the cause was noticed for trial. At the circuit Willett Raynor and Josiah Wright interposed a plea of *puis darrein continuance*, that on, &c., at, &c., the plaintiff by a release under seal discharged Charles Goings from all liability as indorser of the note. Wherefore they prayed judgment if the plaintiff ought further to have or maintain his action, &c. To this plea the plaintiff demurred.

B. Davis Noxon, for the plaintiff.
M. T. Reynolds, for the defendants.

By the Court, NELSON, C. J. I am of the opinion the plea constitutes a good bar to the action. As between the first and subsequent indorsers, the former must be regarded in the light of principal; he stands behind them upon the paper, and is bound to take it up, in case

[1] Wheatley v. Bastow, 7 De G., M. & G. 261, *Accord.* — ED.
[2] 7 De G., M. & G. 261, 279, 280.
[3] 3 Metc. 515.
[4] 60 N. Y. 214.
[5] 10 Johns. Rep. 400.
[6] 11 Johns. Rep. 488.
[7] 5 Heisk. (Tenn.) 256.

of default of the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties), on general principles, operates to release them.

It is said their rights are not prejudiced, as they may still resort to an action against him if subjected to the payment of the note, as the release leaves the implied contract existing between the first and subsequent indorsers unimpaired. Conceding this to be so, to permit a recovery against the defendants would but lead to an unnecessary circuity of action. The plea shows a discharge for a presumed good consideration (as it is under seal) of the first indorser, and it cannot be doubted, as the case stands, that if the defendants should be obliged to call upon him, the plaintiff would be bound to take his place. The case, therefore, comes within the familiar rule, that a release of the principal operates to discharge the surety.

It is further said, that Goings may not have been legally charged as an indorser. If this were so, the plaintiff should have replied the fact, as we will not presume it in the face of the acts of both him and the plaintiff to the contrary. The release would not have been necessary on such a supposition.

Judgment for defendants on demurrer; leave to amend on usual terms.[1]

PHELPS AND OTHERS v. BORLAND, RESPONDENT.[2]

IN THE COURT OF APPEALS, NEW YORK, NOVEMBER, 1886.

[*Reported in* 103 *New York Reports*, 406.]

FINCH, J.[3] The defendant, a citizen of this country, drew a bill of exchange to his own order at sixty days' sight upon Johnston & Co., who were English merchants residing in Liverpool. The defendant sold it to the plaintiffs, who were American bankers, residing in New York. The bill was duly accepted by Johnston & Co., payable in London, who thereby, as to the plaintiffs, became the principal debtors, the drawer being contingently liable upon their default and holding the position of a surety for the payment of their debt. The bill was protested for non-payment at its maturity, Johnston & Co. having failed and being unable to meet their liabilities, and the holders now sue the drawer to recover its amount. The latter defends upon the ground that, as surety, he was entitled, upon payment of the bill, to be subrogated to the rights of the holder, and that the latter had so destroyed

[1] English v. Darley, *supra*, 152, per Lord Eldon; Curry v. Bank, 8 Port. (Ala.) 360; Brown v. Williams, 4 Wend. 360; Farmers' Bank v. Blair, 44 Barb. 641, 654 (*semble*); Deck v. Works, 22 Hun, 266, 272 (*semble*), *Accord*. — ED.

[2] This case should have been inserted in Section II. of this chapter. — ED.

[3] Only the opinion of the Court is given. — ED.

or materially impaired those rights as to have lost all remedy against the drawer. The fact relied on as the cause and basis of this result is, that the acceptors were discharged in bankruptcy upon a compromise by the English courts, and that the plaintiffs, who were originally not parties to the proceeding, became so afterward voluntarily, and proved their claim and accepted the composition decreed, whereby the judgment became binding upon them in this country as well as in England, and so the acceptor was wholly discharged and his right of subrogation as surety rendered valueless. The answer made to this contention is, that the foreign discharge in bankruptcy was operative against the holders in this country, even although they had never become parties to the proceeding, and so the release of the acceptor flowed from no act of theirs, and consequently they had not invaded or affected the drawer's rights.[1] . . .

It follows, therefore, in the present case that the foreign discharge would have been, in and of itself, no defence against the American holder of the bill. If property of the bankrupt should be found in our jurisdiction, the plaintiffs were at liberty to proceed against it by attachment and collect their debt out of such property, and the foreign bankruptcy proceedings would neither prevent nor stand in the way, for the sufficient reason that their only force in our jurisdiction comes from our consent, and we have chosen thus to limit that consent. The right remaining to the plaintiffs was a valuable right. It charged with the payment of the protested bill any present or future acquisitions of the acceptors which might come into our jurisdiction, and might result in the collection of the whole debt, or a compromise settlement induced by the desire or interest of the debtors to have access to our markets, and freedom to resume their business among us. To that right, thus valuable and material, it was the privilege of the surety to succeed, by way of subrogation, whenever he should pay the debt, and the plaintiffs could not deprive him of it or impair and destroy it, except at the peril of releasing him from his liability. Just that was what the plaintiffs did. Tempted by the compromise offered, they sought to obtain the defendant's consent to its acceptance by him. That consent was withheld, but they, acting upon their own conceptions of what was most for their interest, voluntarily submitted themselves and their rights as creditors to the foreign jurisdiction, proved their debt, and accepted the compromise decreed. The condition of the dividend was a release of the debtor. They could not take the compromise and avoid the condition, and so by their act they discharged the acceptors entirely and everywhere. That such is the effect of their voluntary submission to the foreign jurisdiction is inevitable on principle, and has been often decided. Gardner *v.* Oliver Lee & Co.'s Bank;[2] Clay *v.* Smith.[3]

[1] The Court here discussed May *v.* Breed, 7 Cush. 15, *In re* Waite, 99 N. Y. 433, and Baldwin *v.* Hale, 1 Wall. 223, and decided that a foreign discharge is no bar to an American creditor who has never become a party to the bankruptcy proceedings. — Ed.

[2] 11 Barb. 558.

[3] 3 Peters (U. S.), 411.

The unavoidable consequence follows. The creditor having by his own voluntary act released the debtor from all remaining liability, his surety is discharged. The Courts below so held, and we think correctly.[1]

The judgment should be affirmed, with costs.

All concur, except EARL, J., dissenting, and RUGER, C. J., not voting. *Judgment affirmed.*[2]

[1] The Court decided further that the indorser had not consented to the proof by the holder against the bankrupt. — ED.

[2] Gardner *v.* Lee's Bank, 11 Barb. 558; Third Bank *v.* Hastings, 134 N. Y. 501, 505 (*semble*), *Accord*.

A creditor who received a fraudulent preference, with knowledge of his debtor's insolvency, was obliged, under the Bankrupt Act, to surrender the payment and also to forfeit his right to prove against the bankrupt principal. The loss of this right to prove against the principal entailed the loss of his claim against the surety. Bartholow *v.* Bean, 18 Wall. 635 (*semble*); *In re* Ayers, 6 Biss. 48; Northern Bank *v.* Cooke, 13 Bush, 340; Jefferson Bank *v.* Streeter, 106 N. Y. 186 (*semble*).

But see, *contra*, Watson *v.* Pogue, 42 Iowa, 582; Harner *v.* Batdorf, 35 Ohio St. 113. — ED.

Phelps v Borland

Holder of bill v drawer, x was citizen of US, & acceptors were Eng citizens. x sold bill to Π's, bill was accepted by drawer, payable in London, & then protested at maturity because of failure of acceptors. Π's applied to Δ to consent to a discharge in bankruptcy of acceptor in Eng under a compromise settlement, but Δ's refused. Π's contended that Eng discharge was obligative against creditors in this country, & hence was by operation of law, & surety would not be released.

Judgment for Δ. Eng discharge would not operate to bar Amer creditors, not a party to proceedings, & holder of bill would then have right against whatever property came into U.S. To this Π, surety had Π to be subrogated, but Π's made themselves parties to the bankruptcy proceedings in Eng, & hence they would have no such Π, & this will discharge the surety absolutely x

Pay to order of Borland

Borland U.S

To Johnston & Co Eng
accepted " "
Indorsed Borland U.S
Phelps U.S

Clark v Sickler

Π was holder of note made jointly by one Mott, Principal, & Δ as surety. Note was over-due, & Mott went to Π to buy note, & Π refused to receive it, saying he had no use for it, & requested Mott to keep it. Mott did so, & then became insolvent, & now Π tries to recover against S. who claims to be discharged.

Ct held that Δ was not discharged. Sts are not impaired, because this was only indulgence, & S could compel suit at any time, which he did not do. Ct also seems to think that there was no tender of the money but, ag qu.

SECTION V.

Creditor's Failure to use Money within his Control in Lawful Payment of his Claim.

see Pearl v Sleeper, p. 192

CLARK, ADMINISTRATOR, RESPONDENT, *v.* J. G. SICKLER, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, FEBRUARY 22, 1876.

[*Reported in* 64 *New York Reports*, 231.]

CHURCH, C. J.[1] This action is upon a promissory note made by one Mott, as the principal debtor, and by the defendant's intestate as his surety. The referee found that Mott, the principal debtor, some time after the note was due, went to the holder with the money to pay it, which the latter (by his wife acting for him with authority) declined to receive, giving as a reason that he had no use for the money, and requested that Mott would keep it. It is also found that Mott was then solvent, and afterwards became insolvent, and the question is, whether the surety is discharged. As a matter of abstract equity, the argument is plausible, at least, that inasmuch as the note was not paid by reason of the request of the holder, the latter ought not to enforce it against the surety after the principal debtor had become insolvent. The general rule applicable to the relation of creditor and surety is stated by Judge Story as follows: "If a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him." 1 Story's Equity, §§ 325, 326, and cases cited in note. The current of authority, which I think is quite harmonious, establishes that the act which will discharge a surety must be legally injurious or inconsistent with his legal rights. An agreement with the principal debtor extending the time of payment, or in any manner changing the contract made by the surety, will have that effect. So the release of a security held by the creditor and the like. The facts found by the referee do not present a case within the rule. The contract was not changed. The time was not extended by any binding agreement. An action might have been brought immediately after the transaction in respect to the payment, and the circumstances which took place would not have constituted a defence. It is well settled that mere indulgence will

[1] Only the opinion of the Court is given. — ED.

not discharge a surety. 45 Barb. 214; 3 N. Y. 446; 15 J. R. 433. The holder preferred not to collect the note, and gave indulgence, but not a stipulated extension. The other principle referred to is, that the surety may be discharged from an omission of duty on the part of the creditor, but the surety must intervene and request the performance of the duty. It has been established, accordingly, that if a surety request the creditor to sue, and the latter neglects to do so, the surety will be discharged if the neglect has produced injury. 25 N. Y. 552. Here there was no request. The surety did nothing. He was not prevented from demanding prosecution by the creditor, nor from paying the note and prosecuting the principal himself.

We are now asked to go a step further and hold that if a note is not paid because the creditor prefers to give indulgence rather than receive payment, the surety is discharged if the principal debtor happens to become insolvent. We have not been referred to any authority for such a precedent. The case of Lewis *v.* Van Dusen[1] was upon a guaranty of collection. It does not appear distinctly upon what ground the Court placed its decision; but the question of diligence was necessarily involved, besides the refusal to accept the money when offered, and there was a neglect to prosecute for two years, during which the guarantor became insolvent. The decision was clearly right without the fact of the offer to pay, and that circumstance only aggravated the laches. In the case cited from 46 Vermont 258 there was a tender of the money due, which was held to discharge the surety, although not accepted. On the other side, the recent case in this Court of the Second National Bank of Oswego *v.* Poucher,[2] decided that where a debtor owing two demands offered to pay one of them, and was induced by the creditor to pay the other, the indorsers upon the demand not paid were not discharged. The circumstances which will discharge a surety are well defined by repeated adjudications, viz., the doing an act which is legally injurious to the surety, or which impairs his legal rights, or the omission to perform a duty when required by a surety, which omission results in injury to the surety. Indulgence to a debtor is not sufficient, and the distinction is not apparent between indulgence, with the expressed consent or even request of the creditor, and mere silent delay, provided the contract is not changed or impaired. It is a common occurrence for debtors to ask indulgence without any specified time, and creditors would constantly be in danger of losing their debts by mere negative acquiescence. The facts presented in this case rarely occur. It is not often that the debtor omits to pay at the request of the creditor, but if we enlarge the grounds for discharging a surety in such a case, we shall establish a precedent which may prove highly injurious in unsettling and weakening the obligations of written

[1] 25 Mich. 351. [2] 56 N. Y. 348.

instruments. It is better to adhere to established general rules than to attempt to work out equity in exceptional cases.

It is quite evident that the creditor had no idea of discharging the surety. He did not prevent the payment of the note. He did not refuse to receive the money. He only expressed a desire that it should not be paid. There was no tender or attempt to tender the money.[1] The contract was not changed. The surety did not intervene and request any action on the part of the creditor; and although loss has occurred in consequence of the indulgence, it cannot be affirmed that the creditor did any act impairing the legal rights of the surety, nor did the latter take any action to relieve himself from liability.

The judgment must be affirmed.

All concur. *Judgment affirmed.*[2]

THE NATIONAL BANK OF NEWBURG *v.* D. SMITH.

IN THE COURT OF APPEALS, NEW YORK, MAY 23, 1876.

[*Reported in* 66 *New York Reports*, 271.]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon a decision of the Court on trial without a jury.

This action was upon a promissory note made by one Thomas George, indorsed by defendant and discounted by plaintiff.

The note was for $500; it fell due February 17, 1874; was not paid; was duly protested, and notice served on defendant. When the note fell due, George had ten dollars and forty-three cents on deposit in the plaintiff's bank. He deposited $500 March 2, 1874, which was credited to him; no directions were given as to the application thereof. The note was not charged to his account, it being the practice not to so charge unless an account is good for the note at the time it falls due.

[1] *Tender of Payment by Principal and Refusal by Creditor.* If the creditor refuses to receive payment when tendered by the principal obligor, the surety is released. Bartholow *v.* Bean, 18 Wall. 635, 642 (*semble*); Curiac *v.* Packard, 29 Cal. 194; Bonner *v.* Nelson, 57 Ga. 433, 437; Spurgeon *v.* Smith, 114 Ind. 453; Fisher *v.* Stockebrand, 26 Kas. 565; Sears *v.* Van Dusen, 25 Mich. 351 (*semble*); Johnson *v.* Ivey, 4 Cold. 608; Watson *v.* Reed, 1 Tenn. Ch. 196, 198; Joslyn *v.* Eastman, 46 Vt. 258.

See, however, State *v.* Alden, 12 Ohio, 59, where the principal was a public officer.

Tender by Surety. The surety is discharged if his own tender of payment is refused by the creditor. Hayes *v.* Joseph, 26 Cal. 535; Sharp *v.* Miller, 57 Cal. 415; O'Connor *v.* Morse, 112 Cal. 31. — ED.

[2] Second Bank *v.* Poucher, 56 N. Y. 348, *Accord.*

Sailly *v.* Elmore, 2 Paige, 497 (*semble*); Spurgeon *v.* Smith, 114 Ind. 453 (*semble*); Johnson *v.* Mills, 10 Cush. 503, *Contra.*

Compare White *v.* Life Ass'n, 63 Ala. 419; Life Ass'n *v.* Neville, 72 Ala. 517. — ED.

On March 4, 1874, another note made by George, payable at plaintiff's bank, and falling due on that day, was presented for payment, was paid by plaintiff, and charged up in George's account.[1]

PER CURIAM. When the note in suit was protested and the liability of the defendant as indorser fixed, there were no funds appropriated for the payment of the same. The general deposit of money afterwards without regard to the note did not, of itself, operate as a payment. On the contrary, as there was no agreement that the money deposited was to be appropriated for such a purpose, the act itself indicates that there was no intention by the depositor or the plaintiff to apply it upon the note. The subsequent disposition of the money, without any objection, confirms the inference that there was no design thus to appropriate it. If such had been the intention no reason exists why a check should not have been given for the amount of the note in suit and the note taken up, or at least a charge made for the same upon the maker's account. In the absence of any express directions or an agreement to that effect, it was optional with the bank whether it should apply the money or not upon the note in suit, and it was under no positive legal obligation to do so. Marsh *v.* Oneida Central Bank;[2] Pitts *v.* Congdon;[3] Beardsley *v.* Warner.[4]

The question is not presented whether the rights of the parties would have been changed if the maker of the note had to his credit on account sufficient to meet the note when it matured, and the authorities cited on this subject, therefore, have no application.

The note having been duly protested and no act done by the plaintiff, which discharged the liability of the indorser, the judgment must be affirmed.

All concur. *Judgment affirmed.*[5]

[1] The arguments of counsel are omitted. — ED.

[2] 34 Barb. 298. [3] 2 Comst. 352. [4] 6 Wend. 611.

[5] Strong *v.* Foster, 17 C. B. 201; Vose *v.* German Bank, 83 Ill. 599; Second Bank *v.* Hill, 76 Ind. 223; Martin *v.* Mechanics' Bank, 6 Har. & J. 235; Nat. Bank *v.* Peck, 127 Mass. 298; People's Bank *v.* Le Grand, 103 Pa. 309; First Bank *v.* Shreiner, 110 Pa. 188; Bank *v.* Peltz, 176 Pa. 513, *Accord.*

White *v.* Life Association, 63 Ala. 419, 430 (*semble*); Dawson *v.* Real Estate Bank, 5 Ark. 283, 297-299 (*semble*); McDowell *v.* Bank, 1 Harringt. 369, *Contra.*

Nor, as a general rule, has the surety any defence, in the case suggested by the Court, that is, where the principal debtor had to his credit, as depositor with the bank, enough to meet his debt when it matured. Strong *v.* Foster, 17 C. B. 201, 213, 224; Nat. Bank *v.* Peck, 127 Mass. 298. In Strong *v.* Foster, Willes, J., said: "This is the first time, I believe, that it has ever been suggested, that when a note given under circumstances like these falls due, and there is a balance in favor of the customer at the time, that balance must of necessity be applied to the discharge of the note."

If, however, the principal makes a note payable at his bank, and the balance in his favor, when the note matures, is large enough to pay it, an indorser or other surety will be discharged, if the bank does not honor the note. For the bank is bound to pay such notes, just as it is bound to honor its customer's checks. Home Bank *v.* Newton, 8 Ill. Ap. 563, 565; Commercial Bank *v.* Henninger, 105 Pa. 496; German Bank *v.* Foreman, 138 Pa. 474; Mechanics' Bank *v.* Seitz, 150 Pa. 632, 637; Bank *v.* Peltz, 176 Pa. 513, 518. — ED.

Natl Bk v Smith

Note made by one George, & being accomodation indorser, when note fell due at Pl's bk George had 10% on deposit x Protest & some months late George deposited $500. Then another note came in & this was charged against the $500. Then George went insolvent, & Pl proceed against the surety indorser.

Ct held & Rightly, Bk is under no obligation to pay note out of funds on deposit. It can do so at its election. & failure to do so wont discharge surety x

Promise Smith

Ind Smith
Natl Bk.

George

If a duty on creditor to accept, or use money in his control in payment of claim, he must do so, else surety is discharged — has he duty or absolutely? If it is optional with creditor, his non action will not discharge surety x

SECTION VI.

Failure of the Creditor to Sue the Debtor at the Surety's Request.

PAIN v. PACKARD & MUNSON.

IN THE SUPREME COURT, NEW YORK, MAY, 1815.

[*Reported in* 13 *Johnson*, 174.]

THIS was an action of assumpsit, on a promissory note made by Packard & Munson, in which Packard alone was arrested, the other defendant being returned not found. The defendant, Packard, pleaded, 1. *Non-assumpsit.* 2. That he signed the note, which was for $100, payable on demand, as surety for Munson; that he urged the plaintiff to proceed immediately in collecting the money due on the note from Munson, who was then solvent; and that, if the plaintiff had then proceeded immediately to take measures to collect the money of Munson, he might have obtained payment from him; but the plaintiff neglected to proceed against Munson, until he became insolvent, absconded, and went away out of the State, whereby the plaintiff was unable to collect the money of Munson.

There was a demurrer to the second plea, and a joinder in demurrer, which was submitted to the Court without argument.

PER CURIAM. The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of The People *v.* Jansen[1] will warrant and support this plea. We there say, a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicity laid down by the Court in the case of Tallmadge *v.* Brush.[2] But this is not such a case. Here is a special request, by the surety, to proceed to collect the money from the principal; and an averment of a loss of the money, as against the principal, in consequence of such neglect.[3] The averments and facts stated in the plea are not repugnant, or contradictory, to the terms of the note. The suit here is by the payee against the makers. The fact of Packard having been security only, is fairly to be presumed to have been known to the plaintiff. He was, in law and equity, therefore, bound to use due diligence against the principal, in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety

[1] 7 Johns. Rep. 336. [2] Not reported.

[3] This averment is material. Herrick *v.* Borst, 4 Hill, 650; Huffman *v.* Hulbert, 13 Wend. 377; Field *v.* Cutler, 4 Lans. 195; Merritt *v.* Lincoln, 21 Barb. 249; Marsh *v.* Dunkel, 25 Hun, 167: Hunt *v.* Purdy, 82 N. Y. 486; Bingham *v.* Meers, 4 N. Dak. 437 (statutory); Weiler *v.* Hocn, 25 Pa. 525. — ED.

might have paid the note and prosecuted the principal; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal, and chose to rest on that, he might do so. In the case of the Trent Nav. Co. *v.* Harley [1] the plea was similar to the present, and not demurred to. The defendant must, accordingly, have judgment upon the demurrer. *Judgment for the defendant.*[2]

[1] 10 East, 34.

[2] Bruce *v.* Edwards, 1 Stew. (Ala.) 11; Herbert *v.* Hobbs, 3 Stew. (Ala.) 9; Goodman *v.* Griffin, 3 Stew. (Ala.) 160; Strader *v.* Houghton, 9 Port. (Ala.) 334; Darby *v.* Berney Bank, 97 Ala. 643 (*semble*); Howle *v.* Edwards, 97 Ala. 649; Hempstead *v.* Watkins, 6 Ark. 317; Thompson *v.* Robinson, 34 Ark. 44; Martin *v.* Skehan, 2 Colo. 614; King *v.* Baldwin, 17 Johns. 384 (reversing s. c. 2 Johns. Ch. 554); Manchester Co. *v.* Sweeting, 10 Wend. 163; Remsen *v.* Beekman, 25 N. Y. 552; Black River Bank *v.* Page, 44 N. Y. 453; Colgrove *v.* Tallman, 67 N. Y. 95; Wheeler *v.* Benedict, 36 Hun, 478 (*semble*); Hancock *v.* Bryant, 2 Yerg. 476; Thompson *v.* Watson, 10 Yerg. 362; Hopkins *v.* Spurlock, 2 Heisk. 152, *Accord.*

In a few jurisdictions the doctrine of Pain *v.* Packard is adopted with the qualification that the request to the creditor to sue the principal debtor must be accompanied by a statement that the surety will not continue liable unless his request is complied with. Cope *v.* Smith, 8 S. & R. 110; Lichtenthaler *v.* Thompson, 13 S. & R. 157; Wetzel *v.* Sponsler, 18 Pa. 460; Conrad *v.* Foy, 68 Pa. 381 (*semble*); Campbell *v.* Sherman, 151 Pa. 70; Jackson *v.* Huey, 10 Lea, 184.

In others the request must be accompanied by an offer to indemnify the creditor for the expenses of the suit. Huey *v.* Pinney, 5 Minn. 310; Benedict *v.* Olson, 37 Minn. 431; Dillen *v.* Russell, 5 Neb. 484.

Wherever Pain *v.* Packard is followed, either with or without the qualifications mentioned in the paragraphs preceding, the request will go for nothing if made before the maturity of the debt. Hellen *v.* Crawford, 44 Pa. 105; Scales *v.* Cox, 106 Ind. 261; Fidler *v.* Hershey, 90 Pa. 363, 366; Hunt *v.* Purdy, 82 N. Y. 486 (*semble*).

Nor will the request to sue have any legal effect, either at common law or under statutes, if the principal and all his property are beyond the jurisdiction of the creditor. Davis *v.* Hatcher, 1 Woods, C. C. 456; Conklin *v.* Conklin, 54 Ind. 289; Phillips *v.* Riley, 27 Mo. 386; Warner *v.* Beardsley, 8 Wend. 194 (*semble*); Alcorn *v.* Commw., 66 Pa. 172; Seattle Co. *v.* Haley, 6 Wash. 302. But see Hayward *v.* Fullerton, 75 Iowa, 371 (turning on the peculiar phraseology of a statute), and Meriden Co. *v.* Flory, 44 Ohio St. 430 (creditor and surety resident in one State, and debtor in another State).

But in most of the States the Courts have repudiated the doctrine of Pain *v.* Packard. Executors of Dennis *v.* Rider, 2 McL. 451; Hartman *v.* Burlingame, 9 Cal. 557 (*semble*); Dane *v.* Cordnan, 24 Cal. 157; Bull *v.* Allen, 19 Conn. 101; Wilds *v.* Attix, 4 Del. Ch. 253; Howard *v.* Brown, 3 Ga. 523; Taylor *v.* Beck, 13 Ill. 376; Carr *v.* Howard, 8 Blackf. 190; Halstead *v.* Brown, 17 Ind. 202; Hogshead *v.* Williams, 55 Ind. 145; Miller *v.* Arnold, 65 Ind. 488; Ingels *v.* Sutliff, 36 Kas. 444; Goodson *v.* Skinner, 47 Kas. 575, 579; Stout *v.* Ashton, 5 Mon. 251; Nichols *v.* McDowell, 14 B. Mon. 6; Boutte *v.* Martin, 16 La. 133; La. Bank *v.* Le Doux, 3 La. An. 674; Page *v.* Webster, 15 Me. 249; Eaton *v.* Waite, 66 Me. 221; Sasscer *v.* Kemp, 6 Gill & J. 243, 249; Gray *v.* Farmers' Bank, 81 Md. 631; Frye *v.* Barker, 4 Pick. 382; Bellows *v.* Lovell, 5 Pick. 307; Haydenville Bank *v.* Parsons, 138 Mass. 53; Inkster *v.* First Bank, 30 Mich. 143; Michigan Co. *v.* Soule, 51 Mich. 312; Routon *v.* Lacy, 17 Mo. 399; Freligh *v.* Ames, 31 Mo. 253; Smith *v.* Frayler, 4 Mont. 489; Quillen *v.* Quigley, 14 Nev. 215; Davis *v.* Huggins, 3 N. H. 231; Mahurin *v.* Pearson, 8 N. H. 539; Morrison *v.* Citizens' Bank, 65 N. H. 253, 280; Manning *v.* Shotwell, 2 South. 584; Pinterd *v.* Davis, 1 Spencer, 205, 1 Zab. 632; Thompson *v.* Bowne, 39 N. J. 2 Bizzell *v.* Smith, 2 Dev. Eq. 27 (*semble*); First Bank *v.* Homesley, 99 N. Ca.

Pⁿ atn v Packard (et al)

Note made by Packard S, & Munson Px Munson absconded, & pleaded that he had requested P to sue Munson, who was then solvent, & that P had not done so, & that if he had done so, he might have collected Pᵗᶠ demurrer

Pᵗᶠ ~~sustained~~ over-ruled demurrer. P is bound to use due diligence as to Principal so as to exonerate the surety, & he has not done that when he delays to sue, surety was not bound to pay note first & then sue principal creditors demurrer

Pa doctrine

TRIMBLE v. THORNE.

In the Supreme Court, New York, May, 1819.

[*Reported in* 16 *Johnson*, 152.]

This was an action of assumpsit, on a promissory note made by James Cunningham, dated the 20th of October, 1813, for $800, payable with interest, six months after date, at the bank of Orange county, to the defendant, who indorsed it to the plaintiff.

It was proved that the plaintiff had admitted that after the note fell due he had been requested by the defendant to prosecute Cunningham, which was not done; and it was admitted that if Cunningham had then been prosecuted, the amount of the note could have been recovered of him.

A verdict was found for the plaintiff, subject to the opinion of the Court on the above case.

Spencer, C. J., delivered the opinion of the Court.

We do not think the case of Pain *v.* Packard applies; for the in-

531; Jenkins *v.* Clarkson, 7 Ohio, 72; Findley *v.* Hill, 8 Oreg. 247; Pickett *v.* Land, 2 Bail. 608; Caston *v.* Dunlap, Rich. Eq. Cas. 77 (but see Lang *v.* Brevard, 3 Strob. Eq. 59, 64–65); Hubbard *v.* Davis, 1 Aik. 296; Hogaboom *v.* Herrick, 4 Vt. 131; Baker *v.* Marshall, 16 Vt. 522; Hickok *v.* Farmers' Bank, 35 Vt. 476; Croughton *v.* Duval, 3 Call, 59; Harris *v.* Newell, 42 Wis. 687.

Even where the doctrine of Pain *v.* Packard obtains, it does not cover the case of the surety's request and the creditor's refusal to distrain the debtor: Brooks *v.* Castor, 36 Ala. 682; Ruggles *v.* Holden, 3 Wend. 216; or to issue execution upon a judgment: Buckalew *v.* Smith, 44 Ala. 638; or to take out letters of administration upon the estate of the deceased principal debtor in order to sue: Brown *v.* Flanders, 80 Ga. 209.

In Alabama the creditor does not lose his remedy against a surety by declining, on the latter's request, to enforce a mortgage. Branch Bank *v.* Perdue, 3 Ala. 409; Haden *v.* Brown, 18 Ala. 641. But see *contra*, Souter *v.* Bank, 94 Ga. 713 (*semble*); Remsen *v.* Beekman, 25 N. Y. 552.

Statutory Provisions. In several States there are statutory provisions in regard to a request by a surety to the creditor to sue the debtor. Nearly all of such statutes require a request in writing, and, by some of them, failure to sue releases the surety even though the surety has suffered no loss by such failure. But there is no uniformity in these statutes which are discussed in the following cases. Pickens *v.* Yarborough, 26 Ala. 417; Savage *v.* Carleton, 33 Ala. 443; Derby *v.* Berney, 97 Ala. 643; Thompson *v.* Robinson, 34 Ark. 44; Bailey *v.* New, 29 Ga. 214; Fish *v.* Glover, 154 Ill. 86; Chrisman *v.* Tuttle, 59 Ind. 155; Barnes *v.* Sammon, 128 Ind. 596; Barnes *v.* Mowry, 129 Ind. 568; McMillin *v.* Deardorff (Indiana Appeals, 1897), 48 N. E. R. 233; Thornburgh *v.* Madren, 33 Iowa, 380; Graham *v.* Rush, 73 Iowa, 451; Shenandoah Bank *v.* Ayres, 87 Iowa, 526; English *v.* Bourn, 7 Bush, 138; Medley *v.* Tandy, 85 Ky. 566; Taylor *v.* Davis, 38 Miss. 493; Brides *v.* Winters, 42 Miss. 135; Smith *v.* Clopton, 48 Miss. 66; Keirn *v.* Andrews, 59 Miss. 39; Routon *v.* Lacy, 17 Mo. 399; Langdon *v.* Markle, 48 Mo. 357; Petty *v.* Douglass, 76 Mo. 70; First Bank *v.* Homersburg, 99 N. Ca. 531; Jenkins *v.* Clarkson, 7 Ohio, 72; Baker *v.* Kellogg, 39 Ohio St. 663; Clark *v.* Osborn, 41 Ohio St. 28; Bailey Co. *v.* Seward (S. Dakota, 1896), 69 N. W. R. 58; Thompson *v.* Watson, 10 Yerg. 362; Sullivan *v.* Dwyer (Texas Civ. Ap. 1897), 42 S. W. R. 355; Harrison *v.* Price, 25 Grat. 553; Kittridge *v.* Stegmier, 11 Wash. 3; Gillilan *v.* Ludington, 6 W. Va. 128. — Ed.

dorser, though in the nature of a surety, is answerable upon an independent contract, and it is his duty to take up the bill when dishonored.[1] *Judgment of nonsuit.*[2]

[1] Ross *v.* Jones, 22 Wall. 576; Freligh *v.* Ames, 31 Mo. 253; Boatmen's Bank *v.* Johnson, 24 Mo. Ap. 316; Wells *v.* Mann, 45 N. Y. 327, 330 (*semble*); Colgrove *v.* Tallman, 67 N. Y. 95, 99 (*semble*); First Bank *v.* Wood, 71 N. Y. 405, 411; Newcomb *v.* Hale, 90 N. Y. 326, 331; Converse *v.* Cook, 25 Hun, 44, 31 Hun, 417; Beebe *v.* West Bank, 7 W. & S. 375.

Nor is one who assigns a chose in action, guaranteeing its payment, treated as a surety within the doctrine of Pain *v.* Packard. Wells *v.* Mann, 45 N. Y. 327; Newcomb *v.* Hale, 90 N. Y. 326. On the other hand the rule of Pain *v.* Packard applies to one who, although originally a principal debtor, has become in effect a surety through the assumption of his liability by another person. Colgrove *v.* Tallman, 67 N. Y. 95. But see *contra*, Fish *v.* Glover, 154 Ill. 86.

In Pitts *v.* Congdon, 2 N. Y. 352, the Court carried the notion that an indorser is not a surety so far as to decide that the owner of a note who transferred it as an indorser continued liable for the full amount of the note, notwithstanding the holder's surrender to the maker of collateral security. — ED.

[2] The plaintiff failed for want of due notice of dishonor to the defendant. Everything is omitted except the opinion of the Court upon the point of request. — ED.

Trover & Thorne

Assumpsit on note by indorsee v indorser, after note was due & had requested Π to sue maker, & Π had refused, & if maker had been prosecuted, face of note could have been recovered & verdict to Π below & [illegible] reversed & Π nonsuited [illegible] maker, where [illegible] void for [illegible] & not matter on other grounds.

Somersall v Barneby

Π agreed to become liable for all debts contracted by son of Δ, in consideration of Δ promising to assume, & save him harmless of such debts. Later Π at son's request became bound as surety in a bond, the condition of which was not performed, & Π was compelled to pay. No notice of this was given to Δ.

It gave judgment for Π. No notice is required, for Δ must find out about future transaction if he is sued in such a case.

Somersall Pl. / Barneby Def.

Chas Fox P.

Robt Clark C.

— 00 / wrong to > at duty Conv. to S.

SECTION VII.

No Notice to Guarantor of Acceptance of the Guaranty.

SOMERSALL *v.* THOMAS BARNEBY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1611.

[*Reported in Croke, James*, 287.]

ASSUMPSIT. Whereas communication was betwixt the plaintiff and defendant for and concerning credit to be obtained and given for Charles Fox; that the defendant, in consideration of the premises, and in consideration that the plaintiff would be obliged for the said Charles in such sums of money and to such persons as the said Charles should desire of the plaintiff, assumed that he would discharge and save harmless the plaintiff of and concerning all such sums of money and all such debts as he should become bound to any person in, as surety, for his said son; and allegeth in fact, that he, at the request of his son, 14 November, at such a place, became obliged, as surety for the said Charles for his debt to one Robert Clerk, in two hundred and forty pounds, with condition for the delivery of twenty foders of lead upon the twentieth day of May following; the which twenty foders of lead, nor any part thereof, the said Charles did not deliver; whereupon the bond was forfeited, and he compelled to pay the said two hundred and forty pounds for the debt of the said Charles to the said Robert Clerk.

The defendant pleaded *non assumpsit;* and found against him to his damages of two hundred and fifty pounds.

And it was now moved in arrest of judgment,

Fourthly,[1] Because it is not alleged that he gave notice unto the defendant of that bond, nor requested him to save him harmless from it; and the defendant is a stranger thereto, and doth not know in what bonds the plaintiff is obliged with his said son; and being a future thing to be entered into by the plaintiff, the defendant, being a stranger, ought to have notice thereof from him: but if it had been to save him harmless from bonds formerly entered into, it had been otherwise; for there by intendment the defendant had as well cognizance of them as the plaintiff. — *Sed non allocatur;* for the Court said it was all one, and that he at his peril ought to take notice thereof.[2]

Wherefore it was adjudged for the plaintiff.[3]

[1] Only what relates to this objection is here reprinted. — ED.

[2] See also Atkinson *v.* Rolfe, 1 Leon. 105.

[3] Oxley *v.* Young, 2 H. Bl. 613; Lysaght *v.* Walker, 5 Bligh, N. S. 1, 19, 22–23; Oldershaw *v.* King, 2 H. & N. 399, 403, 517; White *v.* Woodward, 5 C. B. 810, 814, 816 (*semble*); Fisk *v.* Stone, 6 Dak. 35; Carman *v.* Elledge, 40 Iowa, 409; Case *v.* Howard,

41 Iowa, 479; Davis Co. *v.* Mills, 55 Iowa, 543; Platter *v.* Green, 26 Kas. 252; Caton *v.* Shaw, 2 Har. & G. 13; Boyd *v.* Snyder, 49 Md. 325 (see also Heyman *v.* Dooley, 77 Md. 162); Crittenden *v.* Fiske, 46 Mich. 70; Wilcox *v.* Draper, 12 Neb. 138; Klosterman *v.* Olcott, 25 Neb. 382; Whitney *v.* Groot, 24 Wend. 82; Smith *v.* Dane, 6 Hill, 543; Union Bank *v.* Coster, 3 N. Y. 203; City Bank *v.* Phelps, 86 N. Y. 484; Niles Co. *v.* Reynolds, 4 N. Y. Ap. Div. 24; Powers *v.* Bumcratz, 12 Ohio St. 273 (overruling *dictum* in Taylor *v.* Wetmore, 10 Ohio, 490); Wise *v.* Miller, 45 Ohio St. 388; Bright *v.* McKnight, 1 Sneed, 158; Yancey *v.* Brown, 3 Sneed, 89; Wells *v.* Davis, 2 Utah, 411; McNaughton *v.* Conklin, 9 Wis. 316 (*semble*), *Accord.*

Douglas *v.* Reynolds, 7 Pet. 113, 12 Pet. 497; Lee *v.* Dick, 10 Pet. 482; Adams *v.* Jones, 12 Pet. 207; Davis Co. *v.* Richards, 115 U. S. 524; Burne *v.* Semmes, 4 Cranch C. C. 702; Hart *v.* Minchen, 69 F. R. 520; Barnes Co. *v.* Reed, 84 F. R. 603; Lawson *v.* Townes, 2 Ala. 373; Walker *v.* Forbes, 25 Ala. 139; Fay *v.* Hall, 25 Ala. 709; Cahusac *v.* Samine, 29 Ala. 288; McCollum *v.* Cushing, 22 Ark. 540; Henderson *v.* Reilly, 1 McArth. 25; Rapelye *v.* Bailey, 3 Conn. 438; Craft *v.* Isham, 13 Conn. 28; Taylor *v.* McClung, 2 Houst. 24; Buckingham *v.* Murray, 7 Houst. 176; Farmers' Bank *v.* Tatnall, 7 Houst. 287; Claflin *v.* Briant, 58 Ga. 414; Newman *v.* Streator Co., 19 Ill. Ap. 594; Ruffner *v.* Love, 33 Ill. Ap. 601; Mayer *v.* Ruhstadt, 66 Ill. Ap. 346; Milroy *v.* Quinn, 69 Ind. 406; Hasselman *v.* Japanese Co., 2 Ind. Ap. 180 (but notice not necessary in Indiana if guaranty is definite as to time and amount of payment. Kline *v.* Raymond, 70 Ind. 271; Snyder *v.* Click, 112 Ind. 293. See also Jackson *v.* Yandes, 7 Blackf. 526; Nading *v.* McGregor, 121 Ind. 465); Kincheloe *v.* Holmes, 7 B. Mon. 5; Bell *v.* Keller, 13 B. Mon. 381; Lowe *v.* Beckwith, 14 B. Mon. 184; Stedman *v.* Guthrie, 4 Met. (Ky.) 147; Thompson *v.* Glover, 78 Ky. 193 (*semble*); Eaton *v.* Harris (Kentucky, 1897), 43 S. W. R. 199; Illinois Bank *v.* Sloo, 16 La. 539; Menard *v.* Scudder, 7 La. An. 386; Lachman *v.* Block, 47 La. An. 505; Norton *v.* Eastman, 4 Me. 521; Seaver *v.* Bradley, 6 Me. 60 (*semble*); Tuckerman *v.* French, 7 Me. 115; Bradley *v.* Cary, 8 Me. 234; Howe *v.* Nickels, 22 Me. 175 (*semble*); Mussey *v.* Rayner, 22 Pick. 223; Allen *v.* Pike, 3 Cush. 238; Paige *v.* Parker, 8 Gray, 211 (*semble*); Bishop *v.* Eaton, 161 Mass. 496; Bascom *v.* Smith, 164 Mass. 61; Winnebago Mills *v.* Travis, 56 Minn. 480; Straight *v.* Wight, 60 Minn. 515 (*semble*); Smith *v.* Anthony, 5 Mo. 504; Central Bank *v.* Shine, 48 Mo. 456; Taylor *v.* Shouse, 71 Mo. 361 (but see Davis Co. *v.* Jones, 61 Mo. 409); Mitchell *v.* Railton, 45 Mo. Ap. 273; Tolman Co. *v.* Means, 52 Mo. Ap. 385; Hill *v.* Calvin, 5 Miss. 231; Montgomery *v.* Kellogg, 43 Miss. 486; Ellis *v.* Jones, 70 Miss. 60; McDougal *v.* Calef, 34 N. H. 534 (*semble*) (but see Bank *v.* Sinclair, 60 N. H. 100); Shewell *v.* Knox, 1 Dev. (N. Ca.) 404 (*semble*); Patterson *v.* Reed, 7 W. & S. 144; Kay *v.* Allen, 9 Barr, 320; Kellogg *v.* Stockton, 29 Pa. 460; Gardner *v.* Lloyd, 110 Pa. 278; Coe *v.* Buehler, 110 Pa. 366; Evans *v.* McCormick, 167 Pa. 247; Bay *v.* Thompson, 1 Pears. (Pa.) 551; King *v.* Batterson, 13 R. I. 117; Sollee *v.* Meugy, 1 Bail. 620; Lawton *v.* Maner, 9 Rich. 335; Wardlaw *v.* Harrison, 11 Rich. 626; Duncan *v.* Heller, 13 S. Ca. 94; Mayfield *v.* Wheeler, 37 Tex. 256; Wilkins *v.* Carter, 84 Tex. 438; Carter *v.* Wilkins (Tex. Civ. Ap. 1895), 29 S. W. R. 1102; Train *v.* Jones, 11 Vt. 444; Oaks *v.* Weller, 13 Vt. 106, 16 Vt. 63; Lowry *v.* Adams, 22 Vt. 160; Woodstock Bank *v.* Downer, 27 Vt. 539; Noyes *v.* Nichols, 28 Vt. 189, *Contra.*

Reasonable Time. The notice of acceptance, when required at all, must be given in a reasonable time. The notice was deemed too late in Mussey *v.* Rayner, 22 Pick. 223 (two years and nine months); Allen *v.* Pike, 3 Cush. 238 (three years). The notice was held to be seasonable in Lowry *v.* Adams, 22 Vt. 160 (two months). In Seaver *v.* Bradley, 6 Me. 60, a delay of ten months was not fatal, the principal debtor continuing solvent. In Central Bank *v.* Shine, 48 Mo. 456, it was thought that failure to give notice was immaterial if the guarantor was not thereby damaged.

Mode of Notice. Notice by mail is sufficient even though it never reach the guarantor. Bishop *v.* Eaton, 161 Mass. 496. But see Hart *v.* Minchen, 69 F. R. 520 (leaving the question open).

Waiver of Notice. *Before Default.* An express stipulation that the guarantor shall receive notice of the principal's default has been adjudged to imply a waiver

M'IVER AND ANOTHER *v.* RICHARDSON.

IN THE KING'S BENCH, MAY 31, 1813.

[*Reported in* 1 *Maule & Selwyn*, 557.]

LORD ELLENBOROUGH, C. J., on this day delivered the judgment of the Court.[1] This was an action against the defendant as guarantor of D. Anderson & Co. for goods which the plaintiffs were about to supply to them, but hesitated so doing upon their credit alone; on which the defendant gave them the paper in question. Under what representation the defendant was induced to sign that paper we know not. The question mainly for our consideration was, whether the paper imports to be a perfect and conclusive guaranty, or only a proposition tending to a guaranty. And in the latter point of view the Court consider it. The paper was to this effect: —

"Messrs. M'IVER & Co.

"GENTLEMEN, — As I understand Messrs. David Anderson & Co., of Quebec, have given you an order for rigging, &c., which will amount to about four thousand pounds, I can assure you, from what I know of D. A.'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guarantee you against any loss from giving them this credit.

"(Signed) JOHN RICHARDSON.

"LIVERPOOL, 12th March, 1811."

We do not know on what kind of previous application the defendant signed it, nor is there any subsequent circumstance stated in the case from which it can be collected. The paper therefore must be construed according to the plain natural import of its terms. The import is, that the party signing it understood that Anderson & Co. had given an order for goods amounting to about £4,000; that this order

of notice of acceptance. Wadsworth *v.* Allen, 8 Grat. 174. But see *contra*, Taylor *v.* McClung, 2 Houst. 24.

After Default. A guarantor, discharged by the creditor's failure to give seasonable notice of acceptance of the guaranty (or of the default of the principal debtor) renounces his defence by a subsequent promise to pay. Gamage *v.* Hutchins, 23 Me. 565; Sigourney *v.* Wetterell, 6 Met. 553; Ashford *v.* Robinson, 8 Ired. 114. The subsequent promise operates here just as in the following cases where the surety, with knowledge of the creditor's agreement to give time to the principal, promised to pay. Stevens *v.* Lynch, 12 East, 38; Mayhew *v.* Crickett, 2 Sw. 185, 192, per Lord Eldon; Smith *v.* Winter, 4 M. & W. 454; Ellis *v.* Bibb, 2 Stew. (Ala.) 63, 70; First Bank *v.* Whitman, 66 Ill. 331; Montgomery *v.* Hamilton, 43 Ind. 451 (*semble*); Williams *v.* Boyd, 75 Ind. 286; Crutcher *v.* Trabue, 5 Dana, 80; Young *v.* New Farmers' Bank (Kentucky, 1897), 43 S. W. R. 473; Bishop *v.* Eaton, 161 Mass. 501 (*semble*); Porter *v.* Hodenpuyl, 9 Mich. 11 (*semble*); Hooper *v.* Pike (Minnesota, 1897), 72 N. W. R. 829; Merrimack Bank *v.* Brown, 12 N. H. 320 (*semble*); Fowler *v.* Brooks, 13 N. H. 240 (*semble*); Rochester Bank *v.* Chick, 64 N. H. 410 (*semble*); Bramble *v.* Ward, 40 Ohio St. 267; Dey *v.* Martin, 78 Va. 1 (*semble*); Fay *v.* Tower, 58 Wis. 286 (*semble*). But see *contra*, Walters *v.* Swallow, 6 Whart. 446. — ED.

[1] Only the opinion of the Court is given. — ED.

remained unexecuted; and then, as if a question had been put to the defendant respecting the honor and probity of Anderson & Co., the defendant says, "I can assure you from what I know of Anderson, you will be perfectly safe in crediting them to that amount;" and then he adds, "indeed I have no objection to guarantee you against any loss from giving them this credit:" which words import, that if application were made he would guarantee; but no such subsequent application was made, indeed it appears that a guaranty was obtained from another house. A considerable period elapsed, and it was not made known to the defendant until the failure of Anderson & Co. that his paper had ever been communicated to the plaintiffs. Considering this as a mere overture to guarantee, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted, or that there should have been a subsequent consent on his part to convert it into a conclusive guaranty. Under these circumstances, therefore, we think there must be *Judgment of nonsuit.*[1]

DAVIS *v.* WELLS.

IN THE SUPREME COURT, UNITED STATES, OCTOBER, 1881.

[*Reported in* 104 *United States Reports*, 159.]

ERROR to the Supreme Court of the Territory of Utah.

Mr. JUSTICE MATTHEWS delivered the opinion of the Court.

The action below was brought by Wells, Fargo, & Co., against the plaintiffs in error, upon a guaranty, in the following words: —

"For and in consideration of one dollar to us in hand paid by Wells, Fargo, & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo, & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made at the bank of said Wells, Fargo, & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated, Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. [SEAL.]

"Witness: J. GORDON." "J. N. H. PATRICK. [SEAL.]

[1] Symmon *v.* Want, 2 Stark. 371; Mozley *v.* Tinkler, 1 C., M. & R. 692 ("Gentlemen, Mr. France informed me that you are about publishing an arithmetic for him, and I have no objection to being answerable as far as £50. For my reference, apply to Messrs. Brooke & Co. of this place," signed Geo. Tinkler); Kastner *v.* Winstanley, 20 Up. Can. C. P. 101; Sutherland *v.* Patterson, 4 Ont. 565; Scribner *v.* Rutherford, 65 Iowa, 551; Stafford *v.* Low, 16 Johns. 67; Beekman *v.* Hale, 17 Johns. 134; Powers *v.* Bumcratz, 12 Ohio St. 273, 287, 288 (*semble*), *Accord.* — ED.

Mc Ives v Richardson

Ps were about to sell goods to Anderson, but hesitated to do it upon Andersons Credit x Then Δ signed a letter "I have no objection to guarantee you against any loss from giving them" Credit x Credit was given, but no communication of this was made to Δ x It held that this was only a "proposition tending to a guaranty" x

Since only a tentative guaranty, Ps had to notify Δ of this before it became binding on Δ's x This was not given & hence Δ's are not liable x

The answer set up, by way of defence, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co., and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence, that this guaranty was executed by the defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo, & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo, & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo, & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo, & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed; and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.[1]

The charge of the Court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the question whether the guaranty becomes operative if the guarantor be not, within a reasonable time, informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this Court.

It becomes necessary to inquire precisely what has been thus settled, and what rule of decision is applicable to the facts of the present case.

In Adams v. Jones,[2] Mr. Justice Story, delivering the opinion of the Court, said: "And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this Court, after the decisions which have been made in Russell

[1] The statement of the case is abridged. — Ed.
[2] 12 Pet. 207, 213.

v. Clarke;[1] Edmonston v. Drake;[2] Douglass v. Reynolds;[3] Lee v. Dick;[4] and again recognized at the present term in the case of Reynolds v. Douglass. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In Reynolds v. Douglass,[5] decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be "that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted;" and he added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from the facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise;[6]

[1] 7 Cranch, 69. [2] 5 Pet. 624. [3] 7 Pet. 113.
[4] 10 Pet. 482. [5] 12 Pet. 497, 504.

[6] Louisville Co. v. Welch, 10 How. 461, 475; Barnes Co. v. Reed, 84 F. R. 603; Newman v. Streator, 19 Ill. Ap. 594; Ruffner v. Love, 33 Ill. Ap. 601; Kincheloe v. Holmes, 7 B. Mon. 5; Lachman v. Block, 47 La. An. 505; Howe v. Nickels, 22 Me. 175; Winnebago Mills v. Travis, 56 Minn. 480; Mitchell v. Railton, 45 Mo. Ap. 273; Kay v. Allen, 9 Barr, 320; Kellogg v. Stockton, 29 Pa. 460; Wilkins v. Carter, 84 Tex. 438, *Accord*.

Contrast with this view the following statement by Bronson, J., in Smith v. Dann, 6 Hill, 544: "The defendant invited the plaintiff to sell goods to Steel & Wall, on his promise to guarantee the payment of the debt. The plaintiffs assented, and delivered the goods. The proposition of one party was accepted by the other; and according to our notions of the law this made a complete contract. Nothing further was necessary to its consummation. If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to inquire and ascertain what had been done. There is nothing in the defendant's undertaking which looks like a condition, or even a request, that the plaintiffs should give him notice if they acted upon the guaranty; and there is no principle upon which we can hold that notice was an essential element of the contract." — ED.

in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.[1]

The former is the sense in which the rule is to be understood as having been applied in the decisions of this Court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formerly declared to be so by Mr. Justice Nelson, speaking for the Court in delivering its opinion in Louisville Manufacturing Co. *v.* Welch,[2] where he uses this language: "He [the guarantor] has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this Court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in Wildes *v.* Savage,[3] Mr. Justice Story, who had delivered the opinion in Douglass *v.* Reynolds,[4] after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and, indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of

[1] "The language relied on was an offer to guarantee, which the plaintiff *might* or might not accept. . . . It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor" (*a*). From the opinion of the Court, per Knowlton, J., in Bishop *v.* Eaton, 161 Mass. 499–500. — Ed.

[2] 10 How. 461, 475. [3] 1 Story, 22. [4] 7 Pet. 113.

(*a*) Oaks *v.* Weller, 13 Vt. 106, *Accord.* — Ed.

the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts,[1] "though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in Wildes *v.* Savage (*supra*), where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor, and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and the guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.[2]

[1] Langdell's Cases on Contracts, 987.

[2] GUARANTY OF EXISTING DEBTS OR OF LIABILITIES ARISING AT THE MOMENT THE GUARANTY IS GIVEN. Bushnell *v.* Church, 15 Conn. 406; Chester *v.* Leonard, 68 Conn. 495; Solary *v.* Stultz, 22 Fla. 263; Sanderson *v.* Etcherson, 36 Ga. 404; Wills *v.* Ross, 77 Ind. 1; Bechtold *v.* Lyon, 130 Ind. 194; Mitchell *v.* McClary, 42 Md. 374, *Accord.*

Duncan *v.* Heller, 13 S. Ca. 94; Wilkins *v.* Carter, 84 Tex. 438, *Contra.*

GUARANTY IN CONSIDERATION OF $1. Taylor *v.* Tolman, 47 Ill. Ap. 264; Sears *v.* Swift, 66 Ill. Ap. 496; Furst Co. *v.* Black, 111 Ind. 308; Howe *v.* Nickels, 22 Me. 175; March *v.* Putney, 56 N. H. 34; Johnson *v.* Bailey, 79 Tex. 516, *Accord.*

Farmers' Bank *v.* Tatnall, 7 Houst. 287, *Contra.*

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guarantee the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality: the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action, — "we hereby guarantee unto them, the said Wells, Fargo, & Co., unconditionally, at all times," &c., — cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guarantee the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo, & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words, "for and in consideration of one dollar to us paid by Wells, Fargo, & Co., the receipt of which is hereby acknowledged, we hereby guarantee," &c. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo, & Co., communicated to the guarantors? Wells, Fargo, & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of Lawrence *v.* McCalmont,[1] and was overruled. Mr. Justice Story said: "The guarantor acknowledged the receipt of the one dol-

Compare Barnes Co. *v.* Reed, 84 F. R. 603.

Bilateral Contracts. Wildes *v.* Savage, 1 Story, 22; Bechtold *v.* Lyon, 130 Ind. 194 (*semble*); Cook *v.* Orne, 37 Ill. 186; Neagle *v.* Sprague, 63 Ill. Ap. 25; Lehigh Co. *v.* Scallen, 61 Minn. 63, *Accord.* — Ed.

[1] 2 How. 426, 452.

lar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small and nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in Dutchman v. Tooth,[1] where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the Court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety, and cannot be separated into distinct parts. The covenant is single, and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that he delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire what effect is to be given to the use of the words which declare that the guarantors thereby "guarantee unto them, the said Wells, Fargo, & Co., unconditionally, at all times, any indebtedness of Gordon & Co., &c., to the extent and not exceeding the sum of ten thousand dollars, for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo, & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it

[1] 5 Bingham's New Cases, 577.

cannot be waived. We do not see, therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligation are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo, & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this Court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the Court below. These exceptions are based on the propositions, —

1. That if Wells, Fargo, & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and,

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty.

For if the necessity in either or both of these contingencies existed to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions were waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defence.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies.[1] Such

[1] In jurisdictions where notice of acceptance of a guaranty is required, failure to give notice, within a reasonable time after the close of the transactions under a continuing guaranty, of the amount advanced thereunder will discharge the guarantor, unless it appears that the guarantor was not prejudiced by the creditor's *laches*. Douglas *v.* Reynolds, 7 Pet. 113 (*semble*); Louisville Co. *v.* Welch, 10 How. 461; Cremer *v.* Higginson, 1 Mas. 323; Wildes *v.* Savage, 1 Story, 22, 33 (*semble*); Craft *v.* Isham, 13 Conn. 28; Davis Co. *v.* Mills, 55 Iowa, 543; Singer Co. *v.* Littler, 56 Iowa, 601; Howe *v.* Nickels, 22 Me. 175; Babcock *v.* Bryant, 12 Pick. 133; Courtis *v.* Dennis, 7 Met. 510; Clark *v.* Remington, 11 Met. 361; Paige *v.* Parker, 8 Gray, 211; Whiting *v.* Stacy, 15 Gray, 270; Montgomery *v.* Kellogg, 43 Miss. 486; Beebe *v.* Dudley, 26 N. H. 249; Bay *v.* Thompson, 1 Pears. 551.

But see *contra*, Cahusac *v.* Samini, 29 Ala. 288; Lowe *v.* Beckwith, 14 B. Mon. 184. — Ed.

was the express decision in Louisville Manufacturing Co. *v.* Welch, *supra*. An unreasonable delay in giving notice, or a failure to give it altogether, is not of itself a bar.

There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty. It was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balances of Gordon & Co.'s account, which were entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned. The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record. *Judgment affirmed.*

C. B. MAYNARD *v.* JAMES MORSE AND AARON MORSE.

IN THE SUPREME COURT, VERMONT, JANUARY TERM, 1864.

[*Reported in* 36 *Vermont Reports*, 617.]

ASSUMPSIT upon the following contract: "Hydepark, July 17, 1855. For value received we jointly and severally promise to pay C. B. Maynard, or order, any sum of money that James Morse may be indebted to said Maynard up to the 1st day of November next, said sum not to exceed five hundred dollars at any one time and interest. James Morse. Aaron Morse." Plea, the general issue. Trial by jury, at the September Term, 1863, Aldis, J., presiding. The plaintiff introduced this contract, and then proceeded to show that James Morse was justly indebted to the plaintiff, up to November 1st, 1855, in the sum of $500. The only exception taken was upon this point, viz., The defendant Aaron Morse, who signed the contract as surety for James Morse, claimed that the contract aforesaid was a mere guaranty, and that Aaron Morse was entitled to notice of the acceptance of the said guaranty by Maynard, and that the plaintiff acted upon it in allowing the defendant James Morse to become indebted to him to the aforesaid amount of $500. But the Court ruled otherwise, and under this ruling the defendant Aaron Morse submitted to a verdict for the plaintiff, and excepted to the decision of the defendant.

Edson & Rand, for the defendant.

W. C. Wilson and *H. S. Royce*, for the plaintiff.

BARRETT, J. The question is not, whether James Morse could become a guarantor, in the commercial sense, for his own debt, nor

Davis v Wells

One Gordon owed debt to π of £9,000. Δ signed guaranty for consideration of £1- Δ guaranteed unconditionally an indebtedness now due, or that might be thereafter made to the extent of £10,000. This was delivered to London, & by him to π. π let G's acct run for 8 mos, when it was closed & balance due was £6,000, for which demand was made of G, & then of Δ. Δ's defence was no notice by π's of their acceptance of guaranty.

Held for π. Theory of whole guaranty & notice of acceptance is that of contract. If acceptance is to be by promise of other side, notice should be given. If by action, no notice is necessary. Here there was a contract between the parties, & consideration has moved to Δ, because contract recites consideration rec'd from π. It may be a guaranty of an existing, or a future debt, provided there is adequate consideration.

Here offer of guarantor was accepted by π, & was understood to be a complete contract on delivery. As such, notice was not necessary.

Dictum that even if notice was required by the nature of a guaranty relation, that Δ had waived it here.

Maynard v Morse & Morse

Δ's signed a guaranty of indebtedness due from one of Δ's up to a certain amt, one of Δ's being S & the other P. Π sues Δ's jointly, & one of them claims that he was entitled to notice of acceptance by Π, & since he did not get it he was discharged.

Ct gave judgment for Π. Obligation is joint, & both parties must have known that it would become effective on being delivered to Π & knowledge or assent given to one of co-makers makes the instrument effective, & the other party liable.

whether, if Aaron Morse had individually executed such a paper as the present, he would have been a guarantor of James, in the commercial sense, and thereupon been entitled to notice that the guaranty had been acted upon.

But it is whether, by force of the instrument in this case, the defendants became bound to perform according to its stipulation, upon its being received by the plaintiff for property or money advanced to James.

The defendants, by this paper, assume a joint obligation, to become operative upon a specified event, as constituting the consideration. If such consideration be valid to give the instrument effect as to either, it gives it effect as to both; and it is not allowable for one of the obligors to claim exemption on the score of some peculiar relation that he, in fact, sustained to his fellow; unless the obligee has been guilty of some fraud, or bad faith, that would avoid the obligation assumed by the tenor of the contract.

There is no question but that the obligation of the paper became effectual as to James Morse, when the plaintiff took it and advanced property to him on the strength of it. We have not been apprised of any principle or case which distinguishes between joint obligors or promisors in respect to their respective liability to the obligee or promisee, where the undertaking is for the same thing and upon the same consideration.

We see no occasion to discuss the subject of notice to a guarantor, as involved in many of the cases, — for we do not think it is involved in this beyond the notice operated by the fact that James Morse passed off the paper for property advanced just as the paper was upon its face intended to be used; and the effect of this act was the same as to both the joint makers of the instrument. If that act be treated in the nature of notice of the acceptance of the paper, then by force of the joint relation of the defendants, it operated upon both to every legal intent of fixing the liability of both. *The judgment is affirmed.*[1]

[1] See to the same effect Hall v. Weaver, 34 F. R. 104; McMillan v. Bull's Head Bank, 32 Ind. 11; Bryant v. Stout, 16 Ind. Ap. 380 (explaining La Rose v. Bank, 102 Ind. 332); Bank v. Kercheval, 2 Mich. 504; Cox v. Machine Co., 57 Miss. 350, in which cases the surety and principal joined in the execution of a bond; and Saint v. Wheeler, 95 Ala. 362, where the joint obligation was a covenant. — ED.

SECTION VIII.

No Notice to Guarantor of Default of Principal Debtor.

BROOKBANK *v.* TAYLOR.

IN THE EXCHEQUER CHAMBER, HILARY TERM, 1624.

[*Reported in Croke, James,* 685.]

ASSUMPSIT. Whereas the plaintiff, at the defendant's request, 20 April, 19 Jac. I., demised to one John Jennings his house in London for a year *a prædicto* 20 *Aprilis*, 19 Jac. I., rendering fifty shillings quarterly; that the defendant promised, if the said Jennings did not pay the rent, that he would pay it; and allegeth in fact, *quod virtute dimissionis* he entered the aforesaid 20 April, 19 Jac. I., and was possessed, and had not paid the rent; and that the defendant, *licet requisitus*, had not paid it. The defendant pleaded *non assumpsit;* and found against him; and the jury find damages *occasione assumptionis prædict.* to five pounds; and judgment thereupon; and error thereupon in the Exchequer Chamber.

The second[1] error assigned was, because it is not alleged that notice was given that the other had not paid. *Sed non allocatur;* for he at his peril ought to take cognizance of the non-payment and pay the rent, otherwise the promise is broken.

Wherefore the judgment was affirmed.[2]

[1] Only what relates to this error is here reprinted. — ED.

[2] *Guaranty of a Definite Payment or Performance at a Definite Time.* Voltz *v.* Harris, 40 Ill. 155; Taylor *v.* Taylor, 64 Ind. 356; Frash *v.* Polk, 67 Ind. 55; Kline *v.* Raymond, 70 Ind. 271; Shearer *v.* Peele, 9 Ind. Ap. 282 (but see Virden *v.* Ellsworth, 15 Ind. 144; Gaff *v.* Sims, 45 Ind. 262; Ward *v.* Wilcox, 100 Ind. 52; Snyder *v.* Click, 112 Ind. 293); Douglass *v.* Howland, 24 Wend. 35; Van Rennselaer *v.* Miller, Hill & D. 237; Barhydt *v.* Ellis, 45 N. Y. 107 (*semble*); Cordier *v.* Thompson, 8 Daly, 172; Weiler *v.* Henarie, 15 Oreg. 28; Bank *v.* Hammond, 1 Rich. 281; Savings Bank *v.* Strother, 28 S. Ca. 504; Hunter *v.* Dickinson, 10 Humph. 37 (but see Kannon *v.* Neely, 10 Humph. 288; Rhodes *v.* Morgan, 1 Baxt. 360); Mallory *v.* Lyman, 3 Pinn. (Wis.) 443, *Accord.*

Ringgold *v.* Newkirk, 3 Ark. 96; Vinal *v.* Richardson, 13 All. 521, *contra.*

Guaranty of Payment or Performance Indefinite in Amount, or at an Indefinite Time. Treweek *v.* Howard, 105 Cal. 434 (statutory); Hammond *v.* Gilmore, 14 Conn. 479; Bushnell *v.* Church, 15 Conn. 406; Redfield *v.* Haight, 27 Conn. 31; Kincheloe *v.* Holmes, 7 B. Mon. 5 (*semble*); Lowe *v.* Beckwith, 14 B. Mon. 184; Heyman *v.* Dooley, 77 Md. 162 (*semble*); Farmers' Bank *v.* Kercheval, 2 Mich. 504 (*semble*); Grant *v.* Hotchkiss, 26 Barb. 63; Clark *v.* Burdett, 2 Hall, 197; Yancey *v.* Brown, 3 Sneed, 89; Train *v.* Jones, 11 Vt. 444; Noyes *v.* Nichols, 28 Vt. 159, *Accord.*

But in some jurisdictions the guarantor is discharged to the extent of any loss that would result to him by the creditor's failure to give reasonable notice of the prin-

Brookbank v Taylor

π leased house to one Jennings at a certain rent x Δ promised that if J did not pay, he would x π alleged that J had not paid rent, & that the Δ would not pay x judgment for π below x On error Δ alleged that π should have given notice of default of J.

Held that this was not necessary, & that Δ was bound to find out default at his peril x Judgment for π.

C. HUNGERFORD *v.* J. K. O'BRIEN, IMPLEADED, ETC.

IN THE SUPREME COURT, MINNESOTA, JULY 27, 1887.

[*Reported in* 37 *Minnesota Reports*, 306.]

DICKINSON, J.[1, 2] The defendant Sawbridge made his negotiable promissory note, which was indorsed to one Gage, who indorsed it in blank to the defendant O'Brien, and he, before maturity, transferred it for value to the plaintiff, indorsing upon the note and signing this guaranty: "For value, I hereby guarantee the payment of the within note to Cassie Hungerford or bearer." The note was not paid. Nothing was done by the plaintiff at the maturity of the note to fix the liability of the indorser Gage. The defendant O'Brien had no notice of the non-payment of the note until more than a year after its maturity. Upon the trial of the issue raised by the answer of the defendant O'Brien, evidence was presented tending to show that the maker of the note was solvent at the time of its maturity, but has since become insolvent; and that the indorser, Gage, was also solvent. The Court directed a verdict for the plaintiff.

The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expressed the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of "the payment of the within note" imported an undertaking, without condition, that, in the event of the note not being paid according to its

cipal's default. Reynolds *v.* Douglas, 12 Pet 497 (qualifying s. c. 7 Pet. 113); Wildes *v.* Savage, 1 Story, 22 (*semble*); Dunbar *v.* Brown, 4 McL. 166; Walker *v.* Forbes, 25 Ala. 139; Cahusac *v.* Samini, 29 Ala. 288; McCollum *v.* Cushing, 22 Ark. 540; Maybury *v.* Bainton, 2 Harringt. 24; Taussig *v.* Reid, 145 Ill. 488; Smith *v.* Bainbridge, 6 Blackf. 12; Furst Co. *v.* Bradley, 111 Ind. 308 (but see Kirby *v.* Studebaker, 15 Ind. 45; Nading *v.* McGregor, 121 Ind. 465); Davis Co. *v.* Mills, 55 Iowa, 543; Howe *v.* Nickels, 22 Me. 175; Clark *v.* Remington, 11 Met. 361; Vinal *v.* Richardson, 13 All. 521 (*semble*); Bishop *v.* Eaton, 161 Mass. 496, 501; Montgomery *v.* Kellogg, 43 Miss. 486; Rankin *v.* Childs, 9 Mo. 665; Sullivan *r.* Field, 118 N. Ca. 358.

In Pennsylvania an odd distinction prevails. A general guaranty of payment or performance is treated like a guaranty of collectibility. Johnston *v.* Chapman, 3 Pen. & W. 18; Isett *v.* Hoge, 2 Watts, 128; Hoffman *v.* Bechtel, 52 Pa. 190; Nat. Society *v.* Lichtenwalner, 100 Pa. 100; Tissue *v.* Hanna, 158 Pa. 384; Ritchie *v.* Walter, 166 Pa. 604 (*semble*). But a guaranty of faithful performance or of payment when due is regarded as the undertaking of a surety who becomes absolutely liable immediately on the default of the principal, no diligence of any kind being required. Campbell *v.* Baker, 46 Pa. 243; Reigart *v.* White, 52 Pa. 438; Boschert *v.* Brown, 72 Pa. 372; Korn *v.* Hohl, 80 Pa. 333; Sherman *v.* Roberts, 1 Grant, 261; Cochran *v.* Dawson, 1 Miles, 276; Girard Co. *v.* Finley, 1 Phila. 70. In accordance with this distinction, a promise to be "security" for payment or performance of another is treated as the undertaking of a surety. Marberger *v.* Pott, 16 Pa. 9; Allen *v.* Hubert, 49 Pa. 259; Ashton *v.* Bayard, 71 Pa. 139 (overruling Gilbert *v.* Henck, 30 Pa. 205). — ED.

[1] Berry, J., because of illness, took no part in this case.

[2] Only the opinions of the judges are given. — ED.

terms, — that is, at maturity, — the guarantor should be responsible. The non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand.[1] Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid, and the time when payment should be made, — all of which was known to the guarantor, and appears upon the face of the contract. The liability of the guarantor thus becoming absolute by the non-payment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-

[1] Walton *v.* Mascall, 13 M. & W. 72, 452 (but see Warrington *v.* Furber, 8 East, 242; Holbrow *v.* Wilkins, 1 B. & C. 10; Hitchcock *v.* Humphrey, 5 M. & G. 559); Lee *v.* Dick, 10 Pet. 482, 496; N. Y. Co. *v.* Lombard Co., 73 F. R. 537 (*semble*); Donley *v.* Camp, 22 Ala. 659; Killian *v.* Ashby, 24 Ark. 511; First Bank *v.* Babcock, 94 Cal. 96; Williams *v.* Granger, 4 Day, 444; Breed *v.* Hillhouse, 7 Conn. 523; Clark *v.* Morison, 25 Conn. 576; City Bank *v.* Hopson, 53 Conn. 453; Tyler *v.* Waddington, 58 Conn. 375 (but see Sage *v.* Wilcox, 6 Conn. 81); Wright *v.* Shorter, 56 Ga. 72; Gammell *v.* Parsons, 58 Ga. 54; Gage *v.* Mechanics' Bank, 79 Ill. 62; Stowell *v.* Raymond, 83 Ill. 120; Hooker *v.* Gorring, 86 Ill. 60; Taussig *v.* Bird, 145 Ill. 488, 491–492; Pool *v.* Roberts, 19 Ill. Ap. 438; Burnham *v.* Gallentine, 11 Ind. 295; Studebaker *v.* Cody, 54 Ind. 586; Levi *v.* Mendall, 1 Duv. 77; Gasquet *v.* Thorn, 14 La. 506; Roberts *v.* Hawkins, 70 Mich. 566; Thresher *v.* Ely, 10 Miss. 139; Tatum *v.* Bonner, 27 Miss. 760; Baker *v.* Kelly, 41 Miss. 696; Holmes *v.* Preston, 71 Miss. 541; Wright *v.* Dyer, 48 Mo. 525; Barker *v.* Scudder, 56 Mo. 272; Burrus *v.* Davis, 67 Mo. Ap. 210; Huff *v.* Slife, 25 Neb. 448; Flentham *v.* Steward, 45 Neb. 640 (but see Newton Co. *v.* Diers, 10 Neb. 284); Bank *v.* Sinclair, 60 N. H. 100 (but see Simmons *v.* Steele, 36 N. H. 73); Allen *v.* Rightmere, 20 Johns. 365; Brown *v.* Curtiss, 2 N. Y. 225; Bartholomew *v.* Seaman, 25 Hun, 619; Kenny *v.* Maseman, 14 Daly, 379; Clay *v.* Edgerton, 19 Ohio St. 549; Neil *v.* Trustees, 31 Ohio St. 15, 22; Taylor *v.* Ross, 3 Yerg. 330 (but see Rhodes *v.* Morgan, 1 Baxt. 360); Woodstock Bank *v.* Downer, 27 Vt. 539; Ten Eyck *v.* Brown, 3 Pinn. (Wis.) 452; Hoover *v.* McCormick, 84 Wis. 215, *Accord.*

But in some jurisdictions failure to make due demand on the maker of a note and to give notice of dishonor to the guarantor, will discharge the latter to the extent of any damage due to such *laches*. Lewis *v.* Brewster, 2 McL. 21; Foote *v.* Brown, 2 McL. 369; Fuller *v.* Scott, 8 Kas. 25; Withers *v.* Berry, 25 Kas. 373; Gamage *v.* Hutchins, 23 Me. 565; Bank *v.* Small, 25 Me. 366; Oxford Bank *v.* Haynes, 8 Pick. 423; Talbot *v.* Gay, 18 Pick. 534; Whiton *v.* Mears, 11 Met. 563; Vinal *v.* Richardson, 13 All. 521, 530; Bishop *v.* Eaton, 161 Mass. 496, 501 (*semble*); Simons *v.* Steele, 36 N. H. 73 (*semble*); Grice *v.* Ricks, 3 Dev. 62; Farrow *v.* Respess, 11 Ired. 170; Cox *v.* Brown, 6 Jones (N. Ca.), 100, *Contra.*

See Savings Bank *v.* Strother, 28 S. Ca. 504.

In Iowa the guarantor of a note is discharged to the extent of damage resulting from the *laches* of the holder, but a distinction is taken as to the burden of proof. If the guaranty is by a stranger to the note, the plaintiff must allege and prove diligence or the absence of damage to the guarantor. Sabine *v.* Harris, 12 Iowa, 87; Knight *v.* Dunsmore, 12 Iowa, 35; Picket *v.* Hawes, 14 Iowa, 460. But if the payee or assignee makes the guaranty, he must establish affirmatively the holder's *laches* and damage to himself. Peck *v.* Frink, 10 Iowa, 193; Marvin *v.* Adamson, 11 Iowa, 371; Greene *v.* Thompson, 33 Iowa, 293; Second Bank *v.* Gaylord, 34 Iowa, 246; Martyn *v.* Lamor, 35 Iowa, 235. — ED.

Sandyford v. Gage

note made by Sawbridge, & indorsed & negotiated by Gage to D, who indorsed it to P, along with a guaranty of payment. Note was not paid, & P did not notify Gage of non payment, or protest it. D had no notice of non payment for a yr after maturity. Apparently both Sawbridge & Gage were solvent at maturity of note, but went broke later.

Held that D was discharged by P's failure to give notice. On maturity D's obligation became absolute, & holder's neglect to protest not would not discharge surety D. That fact that maker & indorser late became insolvent is no defence.

Dissent held that D was discharged, reasoning that relation was really one of P & S, & that because of P's laches in pursuing his security, i.e. protest & notice to indorser, D should be discharged to extent of his loss.

Dissent seems better

payment have such effect. Brown *v.* Curtiss;[1] Allen *v.* Rightmere;[2] Newcomb *v.* Hale;[3] Read *v.* Cutts;[4] Breed *v.* Hillhouse;[5] Campbell *v.* Baker;[6] Roberts *v.* Riddle;[7] Bank *v.* Sinclair;[8] Heaton *v.* Hulbert;[9] Dickerson *v.* Derrickson;[10] Penny *v.* Crane Mfg. Co;[11] Clay *v.* Edgerton;[12] Wright *v.* Dyer.[13] See also Vinal *v.* Richardson,[14] modifying former decisions of the same Court.

It follows that the fact that the maker had become insolvent since maturity, or that a mortgage security had become impaired by depreciation in the value of the property, was no defence; nor was it a defence that the guarantor was not notified of the non-payment of the note. We are aware that the position here taken is opposed by some decisions. No valid agreement was shown between the maker and the plaintiff extending the time of payment. From the position above taken, it logically follows that the neglect of the guarantee to take the steps necessary to fix the liability of the indorser, Gage, did not discharge the guarantor. The latter, by his unqualified guaranty of the payment of the note, took it upon himself to see that the note was paid, and was therefore not entitled to notice of its non-payment. (Authorities above cited.) For the same reason, the plaintiff did not owe to the guarantor the duty of taking the steps necessary to fix the contingent liability of the indorser by demand and notice of dishonor. Philbrooks *v.* McEwen;[15] Lang *v.* Brevard;[16] Pickens *v.* Finney.[17] No such obligation is involved in this contract of guaranty. Even in the case of an ordinary indorsement, the holder, at maturity, is under no obligation to his indorser to give notice of dishonor to prior indorsers or parties.[18] The last indorser becomes liable when he alone is notified, and he in turn may fix the liability of prior parties by giving notice to them.

Order affirmed.[19]

MITCHELL, J. (dissenting). I am unable to concur in the proposition that the plaintiff owed no duty to O'Brien to take steps, at the maturity of the note, to fix the liability of Gage, the indorser. It does

[1] 2 N. Y. 225.
[2] 20 John. 365.
[3] 90 N. Y. 326.
[4] 7 Greenl. 186.
[5] 7 Conn. 523.
[6] 46 Pa. St. 243.
[7] 79 Pa. St. 468.
[8] 60 N. H. 100.
[9] 3 Scam. 489.
[10] 39 Ill. 574.
[11] 80 Ill. 244.
[12] 19 Ohio St. 549.
[13] 48 Mo. 525.
[14] 13 Allen, 521.
[15] 29 Ind. 347.
[16] 3 Strob. Eq. (So. Car.) 59.
[17] 12 Smedes & M. 468.

[18] Rickford *v.* Ridge, 2 Camp. 537; Spencer *v.* Ballou, 18 N. Y. 327; Baker *v.* Morris, 25 Barb. 138; Deck *v.* Works, 18 Hun, 266, 272, *Accord.* — ED.

[19] Green *v.* Thompson, 33 Iowa, 293; Deck *v.* Works, 18 Hun, 266, *Accord.*

Philips *v.* Astling, 2 Taunt. 206; Vinal *v.* Richardson, 13 All. 521, 532 (*semble*); City Bank *v.* Young, 43 N. H. 457, 462; Bank *v.* Sinclair, 60 N. H. 100, 107 (*semble*); Brown *v.* Curtiss, 2 N. Y. 225, 228 (*semble*); Gibbs *v.* Cannon, 9 S. & R. 198 (*semble*), *Contra.*

See also, as to the effect of *laches* in collecting a *chose in action* held as collateral security, *supra*, 205, n. 1, *ad finem.* — ED.

not seem to me that the fact that O'Brien's guaranty of payment was unconditional and absolute is at all decisive of the question. As between the parties to this action, O'Brien occupied the position of surety, who, in case he had to pay the note, would have recourse against Gage, the indorser, provided steps were taken to fix the liability of the latter. The question, therefore, is to be determined by the equitable principles which govern the relative rights and duties of creditor and surety.

It is a well-settled rule of equity that any laches by the creditor in the care or management of collateral remedies or securities, if loss ensues, will discharge the surety *pro tanto*. Nelson *v.* Munch.[1] As a surety, on payment of the debt, is entitled to all the securities of the creditor, if, through the negligence of the creditor who has them in his possession and under his control, a security, to the benefit of which the surety is entitled, is lost or not properly perfected, the surety, to the extent of such security, will be discharged. Wulff *v.* Jay.[2] And we can see no difference in this respect whether the security is chattel or personal. This is not a case of mere passiveness by the creditor in not taking steps to enforce collection of the debt at maturity, but an omission to take steps to perfect and fix the liability of the indorser, which amounted to positive negligence. He had possession and control of the note on the day of its maturity, and consequently was the only person who could present it for payment, or who would know whether or not it was paid, and hence was the only person in position to give notice to the indorser in case of its non-payment. To require him to do this, would, I think, be both good business morals and good law.

[1] 28 Minn. 314, 322. [2] L. R. 7 Q. B. 756.

SECTION IX.

Alteration of Principal's Contract, or Variation of Surety's Risk.

DAVIDSON, PUBLIC OFFICER, &c., v. COOPER AND ANOTHER.

IN THE EXCHEQUER CHAMBER, JULY 6, 1844.

[*Reported in* 13 *Meeson & Welsby*, 343.]

LORD DENMAN, C. J.[1] This was a declaration in assumpsit on a written guaranty, to which one defendant pleaded, that, while the guaranty was in the plaintiff's hands, it was, without the defendant's consent or knowledge [by some person or persons to the defendant then and now unknown],[2] materially altered by the addition of two seals opposite the names of the defendant and the other party to it, whereby its apparent nature and effect were wholly altered. Issue being taken on this plea, the jury found it was so altered; and judgment has been given by the Court of Exchequer for the defendant, after having discharged a rule for judgment *non obstante veredicto*, upon argument.

After much doubt, we think the judgment right. The strictness of the rule on this subject, as laid down in Pigot's Case,[3] can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part. To say that Pigot's Case[3] has been overruled, is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be estab-

[1] Only the opinion of the Court is given. — ED.

[2] The bracketed clause is taken from the plea. 11 M. & W. 780. — ED.

[3] 11 Coke, 27.

lished by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed.

Judgment affirmed.

WOOD *v.* STEELE.

IN THE SUPREME COURT, UNITED STATES, DECEMBER, 1867.

[*Reported in* 6 *Wallace*, 80.]

ERROR to the Circuit Court for the District of Minnesota.

Mr. Justice SWAYNE delivered the opinion of the Court.

The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11th, 1858, for $3,720, payable to their own order one year from date, with interest at the rate of two per cent per month, and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis, to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time, it appeared on the face of the note that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the Court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. Instructions were asked by the plaintiff's counsel, which were refused by the Court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the Court as expressed to the jury covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions, — upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month, exonerates the maker who has not assented to it.

... John J ... et al,

Assumpsit on a contract of guaranty, Δ's being guarantors. Plea that seals had been added after Δ's names by persons unknown to them, thus constituting an alteration. Judgment for Δ below, & appeal.

... Held, judgment for Δ. Production of ... makes a ... instrument or obbligation, & this is true to default of holder.

Wood Co. Pd.

Note made by Steele + Nenson, Steele being Surety. When Stelle signed it, date was left, but Nenson changed it to Oct, + on it ~~it~~ loaned money to ~~Steele~~ Nenson + renewed this to hold S on note.

[illegible] + Steele [illegible] changed [illegible] before N ever got the instrument, + [illegible] out of mind.

Was the instruction given correct?

It was a rule of the common law as far back as the reign of Edward III. that a rasure in a deed avoids it.[1] The effect of alterations in deeds was considered in Pigot's Case,[2] and most of the authorities upon the subject down to that time were referred to. In Master v. Miller,[3] the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the Court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed: another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that *it is not his deed;* and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly.[4]

The instruction was correct, and the

Judgment is affirmed.[5]

[1] Brooke's Abridgment, Faits, pl. 11.

[2] 11 Coke, 27.

[3] 4 Term, 320; 1 Smith's Leading Cases, 1141.

[4] Goodman v. Eastman, 4 New Hampshire, 456; Waterman v. Vose, 43 Maine, 504; Outhwaite v. Luntley, 4 Campbell, 180; Bank of the United States v. Boone, 3 Yates, 391; Mitchell v. Ringgold, 3 Harris & Johnson, 159; Stephens v. Graham, 7 Sergeant & Rawle, 509; Miller v. Gilleland, 19 Pennsylvania State, 119; Heffner v. Wenrich, 32 id. 423; Stout v. Cloud, 5 Little, 207; Lisle v. Rogers, 18 B. Monroe, 529.

[5] Miller v. Stewart, 9 Wheat. 680; State v. Churchill, 48 Ark. 426; People v. Kneeland, 31 Cal. 288; Pelton v. San Jacinto Co., 113 Cal. 21; Hill v. O'Neill (Georgia,

1897), 28 S. E. R. 996; Mulky *v.* Long (Idaho, 1897), 47 P. R. 949; Henry *v.* Coats, 17 Ind. 161; Johnston *v.* May, 76 Ind. 293 (amount payable diminished); Stayner *v.* Joice, 82 Ind. 35; Weir Plow Co. *v.* Walmesley, 110 Ind. 242 (compare Huff *v.* Cole, 45 Ind. 300); Marsh *v.* Griffin, 42 Iowa, 403; State *v.* Craig, 58 Iowa, 238; Bank *v.* McChord, 4 Dana, 191; Blakey *v.* Johnson, 13 Bush, 197; Warren *v.* Fant, 79 Ky. 1; Waterman *v.* Vose, 43 Me. 504; Fay *v.* Smith, 1 All. 477; Draper *v.* Wood, 112 Mass. 315; Bradley *v.* Mann, 37 Mich. 1; Haskell *v.* Champion, 30 Mo. 136; Britton *v.* Dierker, 46 Mo. 591; Robinson *v.* Berryman, 22 Mo. Ap. 509; Goodman *v.* Eastman, 4 N. H. 455; McGrath *v.* Clark, 56 N. Y. 34; Jones *v.* Bangs, 40 Ohio St. 139; Newman *v.* King, 54 Ohio St. 273.

A fortiori an alteration of the contractual document by the creditor alone, or by the principal debtor with the concurrence of the creditor, releases the surety. Gardner *v.* Walsh, 5 E. & B. 83 (overruling Catton *v.* Simpson, 8 A. & E. 136; but see Mersman *v.* Werges, 112 U. S. 139, 142); Martin *v.* Thomas, 24 How. 315; U. S. Co. *v.* West Va. Co., 81 F. R. 993; Glover *v.* Robbins, 49 Ala. 219; Hanson *v.* Crowley, 41 Ga. 303; Newland *v.* Harrington, 24 Ill. 206; Pahlman *v.* Taylor, 75 Ill. 629; Wyman *v.* Yeomans, 84 Ill. 403; Bowers *v.* Briggs, 20 Ind. 139; Crandall *v.* First Bank, 61 Ind. 349 (*semble*); Hart *v.* Clouser, 30 Ind. 210; State *v.* Blair, 32 Ind. 313; Franklin Co. *v.* Courtney, 60 Ind. 134; Eckert *v.* Louis, 84 Ind. 99; Hall *v.* McHenry, 19 Iowa, 521; Hamilton *v.* Hooper, 46 Iowa, 515; Robinson *v.* Reed, 46 Iowa, 219; Berryman *v.* Manker, 56 Iowa, 150; Bell *v.* Mahin, 69 Iowa, 408; Locknane *v.* Emerson, 11 Bush, 69; Bracken Co. *v.* Daum, 80 Ky. 388; Jackson *v.* Cooper (Kentucky, 1897), 39 S. W. R. 39; Wilde *v.* Armsby, 6 Cush. 314; People *v.* Brown, 2 Doug. (Mich.) 9; Bolton *v.* Fitz, 88 Mich. 354; State *v.* McGonigle, 101 Mo. 353; State *v.* Findley, 101 Mo. 368; Warden *v.* Ryan, 37 Mo. Ap. 466; Haines *v.* Dennett, 11 N. H. 180; Chappell *v.* Spencer, 23 Barb. 584; Dewey *v.* Reed, 40 Barb. 16; McVean *v.* Scott, 46 Barb. 379; Church *v.* Howard, 17 Hun, 5; Boalt *v.* Brown, 13 Ohio St. 364; Patterson *v.* McNeely, 16 Ohio St. 348; Wallace *v.* Jewell, 21 Ohio St. 163; Harsh *v.* Klepper, 28 Ohio St. 200; Thompson *v.* Massie, 41 Ohio St. 307; Miller *v.* Gilleland, 19 Pa. 119; Neff *v.* Horner, 63 Pa. 327; Fulmer *v.* Seitz, 68 Pa. 237; Hartley *v.* Corboy, 150 Pa. 23; Bogarth *v.* Breedlove, 39 Tex. 561; Davis *v.* State, 5 Tex. Ap. 48; Wegner *v.* State, 28 Tex. Ap. 419; Eyre *v.* Hollier, Ll. & G. 250, *Accord.*

Immaterial Alteration. The creditor's right against a surety is not affected by an immaterial alteration. Gardner *v.* Harback, 21 Ill. 129; Kline *v.* Raymond, 70 Ind. 271; Hunt *v.* Adams, 6 Mass. 519; Bullock *v.* Taylor, 39 Mich. 137; Manufacturers' Bank *v.* Follett, 11 R. I. 92. See also 1 Ames, Cases on Bills and Notes, 449.

Alteration by a Stranger or by Accident. In the United States, if an instrument is once effectually delivered to the creditor, its subsequent alteration by some third person will not release the surety. Anderson *v.* Bellenger, 87 Ala. 334; State *v.* Berg, 50 Ind. 496; Brooks *v.* Allen, 62 Ind. 401; Murray *v.* Graham, 29 Iowa, 520; Medlin *v.* Platt Co., 8 Mo. 235; Brown *v.* Weatherby, 71 Mo. 152; State *v.* McGonigle, 101 Mo. 353 (*semble*); Rhoads *v.* Frederick, 8 Watts, 448; Hill *v.* Calvert, 1 Rich. Eq. 56; Harrison *v.* Turbeville, 2 Humph. 242. See also 1 Ames, Cases on Bills and Notes, 449.

Innocent Alteration by the Holder. It is also generally held in this country that a material alteration by the holder of a bill or note, if made without fraudulent intention, will not bar the right to recover upon the instrument as if unaltered. 1 Ames, Cases on Bills and Notes, 449; Croswell *v.* Labree, 81 Me. 44. But see *contra*, Tormer *v.* Rutland, 57 Ala. 379; Newman *v.* King, 54 Ohio, 273; Taylor *v.* Taylor, 12 Lea, 714.

Ratification or Waiver. A promise by a surety to pay an altered obligation is not a waiver of the defence of alteration. Warren *v.* Fant, 79 Ky. 1. But see Knoebel *v.* Kincher, 33 Ill. 308; Bell *v.* Mahin, 69 Iowa, 408. — Ed.

See N.I.L. Provision Sect 124, & note P. 256 ff.

ELLESMERE BREWERY COMPANY *v.* COOPER AND OTHERS.

IN THE QUEEN'S BENCH DIVISION, DECEMBER 5, 1895.

[*Reported in Law Reports*, 1896, 1 *Queen's Bench Division*, 75.]

LORD RUSSELL, of Killowen, C. J.[1] This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper. At the trial before the learned county court judge, judgment was given for the plaintiffs as against Cooper, and judgment was given for the four remaining defendants as sureties.

The facts were that Cooper, having become agent and traveller for the plaintiffs, was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants.

The bond was dated April 30, 1894. By its terms the five defendants were jointly and severally bound to the plaintiffs in the sum of £150. It then recited that Cooper had been appointed agent for the company, and stated the condition of the bond to be that, if Cooper duly accounted for all moneys received by him for the plaintiffs, and otherwise performed the duties of his agency, the bond should be void. It then provided that the liability of Nunnerley and Emberton (two of the defendants) should be limited to £50 each, and that of Pay and Bromfield (two other of the defendants) to £25 each. The effect, therefore, of the bond, as drawn, was that the principal and the sureties were jointly and severally bound in the sum of £150, but that liability could not be enforced against any of the sureties beyond the limit of the sum specified as to each of them. Nunnerley was the last to sign, and his signature thus appears on the bond: "Walter Nunnerley, twenty-five pounds only." The witness to the execution of each of the signatures was Mr. Bruce, the plaintiffs' manager, who, so far as appears, took the bond without making any objection to the manner of Nunnerley's execution; nor was it suggested that Nunnerly had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point, it cannot be assumed that Nunnerley in bad faith sought by the form of his execution of the bond to limit any liability he had previously agreed to undertake. The probability is that in giving particulars of his sureties Cooper had erroneously stated that Nunnerley had agreed to undertake liability to the extent of £50, whereas he had done so only to the extent of £25. Subsequently Cooper, the principal, received moneys of the plaintiffs to the amount of £48, for which he had failed to account; and judgment was given against him at the trial for that amount. The contested question was the liability of the other defendants, the sureties. The learned county court judge held that no one of

[1] Only the opinion of the court is given. — ED.

them was liable, and gave judgment for them accordingly. The present appeal is against that judgment.

It was argued for the plaintiffs (1) that the form of Nunnerley's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties; (2) that, if an alteration, it was not a material alteration, and therefore did not discharge such sureties; and, lastly, (3) that in any case Nunnerley was liable to the extent of £50, or if not of £50, at least to the extent of £25.

In my judgment, no one of these contentions is well founded. I think the effect of Nunnerley's mode of execution, on the facts of this case, is substantially the same as if the proviso in the body of the bond had been altered by him before execution by him by striking out £50 and inserting instead £25. It was, therefore, an alteration. Its effect I shall presently discuss.

The argument of the learned counsel for the appellant was, that the loss in question was to be divided into fourths, and that so long as each fourth did not exceed the sum for which each surety had become liable, each of them was bound to pay, and without any right to contribution from his co-sureties, whether the fixed limit of his liability was for the greater or the smaller amount. Here it was said the one-fourth of the loss was £12, and as Nunnerley had clearly intended to make himself liable, as also had Pay and Bromfield, for £25 each, it was immaterial whether Nunnerley signed for £25 or £50. Each, it was contended, was bound to pay £12; and Emberton was bound to bear no more of the loss than the others.

In my judgment, this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties *inter se* rests. That principle is, that sureties for the same principal and for the same engagement, even although bound by different instruments and for different amounts, have a common interest and a common burthen; so that if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligation to the creditor he has discharged. But how is the amount of the claim to be determined? According to the argument of the learned counsel for the plaintiffs, it is to be determined by the number of the sureties. Thus, if there are four sureties and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum paid. But how is the amount to be determined, where, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that where the full amount of the bond is due and payable to the creditor, that liability can only be en-

Ellesmere Co v Cooper et al

Cooke was agt for W^m, & was required to give bond for £150 that he would faithfully perform. In bond it recited that Nunnely (Sureties) was to be liable to £50, Embleton to £50, Pay & Bromfield for £25 each. Bond was a joint & several one. Cooke made default to ye tune of £48. It appeared that N. was last to sign, & he put after his name "£25 only", & now question was which of sureties could be held.

Ct held that none of sureties could be held. This varies liability of the sureties & amts to a material alteration of instrument. since each of the sureties becomes liable to a greater percentage of the loss. This discharges other 3 sureties. N. himself cannot be held because he has relied upon contribution from other sureties & they are not liable, & since he is discharged.

forced against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each would have paid to the limit of his liability. But suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties, who has fixed the limit of his liability at one-half the amount of his bond. Could it be said that he had no right to any contribution from his co-sureties? Surely not. The burthen is a common burthen of all, but unequally distributed. By his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties up to the fixed limit. It would be against all equitable principles that in such a case the other sureties should go free because it happened that the creditor had enforced payment against one only. Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was £1,000, has realized £1,000 from such security, being bound with three other sureties with a limit of liability of £2,000 each, making in all £7,000. It is clear that that £1,000 must be taken into account for the benefit of all such sureties *inter se*. But upon what principle? Surely upon the only principle which will secure its equitable division, namely, proportional distribution. Thus the surety for £1,000 would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burthen has to be distributed. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but where the claim is less than such full amount, and is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid.

What I have so far said is, I think, to be gathered from the principles laid down in Dering *v.* Winchelsea;[1] but in Pendlebury *v.* Walker,[2] Alderson, B., expressly states the rule thus: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." In Steel *v.* Dixon,[3] Fry, J., cites with approval the language I have quoted; and, later, Pearson, J., in *In re* Arcedeckne,[4] adopts the language of Fry, J. (See also Ellis *v.* Emmanuel[5] and Evans *v.* Bremridge.[6])

Apply this principle to the present case. I assume the bond to have been executed according to its original tenor without qualification or alteration. The total loss being £48, Emberton, having subscribed for

[1] 1 Cox, 318.
[2] 4 Y. & C. (Exch.) 424.
[3] 17 Ch. D. 825, at p. 830
[4] 24 Ch. D. 709, at p. 714.
[5] 1 Ex. D. 157.
[6] 2 K. & J. 174.

£50 out of the total of £150, would be liable for one-third; and if he paid no more he would have no claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscription. Stated as a sum in proportion, Emberton's liability would be arrived at thus: As 150 is to 50, so is 48 to the result. So worked out, Emberton would be liable for £16 only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for £8 each, and Nunnerley for £16. Now, to appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerley. He explicitly says, "I execute the bond only on the terms of my liability being limited to £25." He could not, therefore, in any case be made liable for more. Whether he can be made liable even for the £25 I shall presently consider. What, then, is the effect of the altered limitation to £25 by Nunnerley upon the position of the other three sureties? Take Emberton's position. For simplicity, assume that the total liability to the plaintiff company for £48 has been paid by Emberton. According to the tenor of the bond without the alteration, Emberton would have to bear two-sixths — equal to one-third of the loss; Nunnerley two-sixths — equal to one-third; and Pay and Bromfield one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerley, and if Nunnerley is not bound at all, would have no right of contribution against him. The alteration was then clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield. The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond. Each of them is entitled to say, "The contract into which I entered was on the basis of Nunnerley being a party to it with a liability of £50. That is not the contract as it now appears from the bond, and I am, therefore, not bound by it." Their position would be still stronger if Nunnerley is not bound by the bond at all. The remaining question then is, Is Nunnerley bound at all? I have already intimated, that as he has expressly said, "I shall be liable only for £25," he cannot be made liable for the £50; but is he liable even for the £25? I think he is not. He, in good faith, expressly limits his liability to £25; but he undertakes that liability, not as a separate or independent liability, but as part of a contract in which three other sureties are joining him, against whom in certain eventualities he will have rights of recourse, between whom and himself a common burthen is to be borne, although unequally distributed. But if in fact such sureties are not bound by the contract (and we have adjudged that they are not), Nunnerley is entitled to say, "This is not the contract into which I have entered, and I am not bound by it."

The judgment of the learned county court judge must stand, and the appeal will therefore be dismissed with costs. *Appeal dismissed.*[1]

[1] The erasure by the creditor of the name of one surety discharges the co-sureties on the same obligation. Nicholson *v.* Revill, 4 A. & E. 675; Mitchell *v.* Burton, 2 Head, 613. But see Collins *v.* Prosser, 1 B. & C. 682. — Ed.

WHITCHER v. JAMES HALL.

IN THE KING'S BENCH, HILARY TERM, 1826.

[*Reported in* 5 *Barnewall & Cresswell*, 269.]

BAYLEY, J.[1] I think that the rule for entering a nonsuit ought to be made absolute. By the agreement which is set out in the declaration, the plaintiff agreed to let, and Joseph Hall agreed to take, the milking of thirty cows (not more nor less) for the sum of £7 10*s.* per cow per annum, to commence on the 14th of February, 1824, and on the conditions therein mentioned. The agreement was, that Joseph Hall was to have the milking of thirty cows, and the benefit was to inure to Joseph, not to James, but the latter stipulated that he would pay the whole rent. One question is, whether that is an entire contract as to the number of cows. If it be, Joseph was entitled to have the milking of thirty cows during the continuance of the term. If it was not an entire contract, but a contract to pay for so many cows as the plaintiff should supply, and the plaintiff supplied twenty-nine or any other number, he would be entitled to payment for so many. I am of opinion that this was an entire contract for the purchase of thirty cows; and if at the commencement of the term the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. I do not enter into the question whether there was a performance of the contract at the commencement of the term. It is sufficient to say that there was a new agreement, without the knowledge of James; that Joseph was to have the milking of twenty-eight cows during one part of the year, and thirty-two during the other part. That, as it seems to me, was not a continuance of the original bargain, which was for the milking of thirty cows, but a new agreement. The new agreement was binding only on those persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it.[2] There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then James is bound by it; otherwise he is not. There is no hardship upon the plaintiff, for he knew that James stipulated to pay the rent upon his, the plaintiff's, fulfilling the terms of the original bargain, and that he, James, was not bound to consent to the substitution of a new contract. In Heard *v.* Wadham[3]

[1] Only the opinion of BAYLEY, J., is given. HOLROYD, J., concurred, but LITTLEDALE, J., dissented. — ED.

[2] If the surety assents to the new contract his liability continues. — ED.

[3] 1 East, 619.

and Campbell *v.* French [1] it was held that the performance of a contract, substantially the same as that originally made, did not give a right of action against a surety who had not consented to the alteration. Here the plaintiff attempts to maintain his action by proving the performance not of the contract declared on, but of a subsequent agreement. But he has averred, and was bound to prove performance of the original agreement. That he has not proved; and, upon that ground, I am of opinion that he was not entitled to recover, and that the rule for entering a nonsuit ought to be made absolute.[2]

SANDERSON *v.* ASTON.

IN THE EXCHEQUER, JANUARY 20, 1873.

[*Reported in Law Reports, 8 Exchequer,* 73.]

DECLARATION on a bond given by the defendant to the plaintiff, the condition of which recited that, by an agreement of even date, the plaintiff had agreed to admit into his service, as clerk and traveller, one John Thomas Johnson, upon Johnson's obtaining two sureties "for his duly and faithfully accounting to the plaintiff, his executors, &c., and other the person or persons who should or might become partner or partners with the plaintiff in his business of a lead, glass, and color merchant, in manner thereinafter mentioned, and for his faithful and honest conduct during the time of his continuance in the said service;" the condition of defeasance being that Johnson should from time to time, and at all times, well and satisfactorily account for, and pay over and deliver to the plaintiff all and every sum and sums of money, &c., which he should receive for the use of the plaintiff, or the plaintiff and any person who might become his partner; and the breach alleged being, that Johnson did not well and satisfactorily account for, or pay over, or deliver to the plaintiff, or to the plaintiff and his partner, certain sums of money (amounting to £84 9*s.*) received by him for the use of the plaintiff and his partner during his service with them.

[1] 2 H. Black. 163; 6 T. R. 200.

[2] Woodcock *v.* Oxford, 1 Drew. 521; Northwestern Co. *v.* Whinray, 10 Ex. 77; U. S. *v.* Tillotson, 1 Paine C. C. 305; St. Louis Co. *v.* Hayes, 71 Fed. Rep. 110; Parke *v.* White River Co., 110 Cal. 658 (real surety); Rowan *v.* Sharps Co., 33 Conn. 1 (real surety); Chester *v.* Leonard, 68 Conn. 495; Bethune *v.* Dozier, 10 Ga. 235; Zimmerman *v.* Judah, 13 Ind. 286, 22 Ind. 388; Peru Co. *v.* Ward (Kansas Appeals, 1895), 41 Pac. R. 64, 51 Pac. R. 805; Plunkett *v.* Davis Co., 84 Md. 529; Erickson *v.* Brandt, 53 Minn. 10; Prior *v.* Kiso, 81 Mo. 241; Beers *v.* Wolf, 116 Mo. 179; Evans *v.* Graden, 125 Mo. 72; Burley *v.* Hitt, 54 Mo. Ap. 272; Consaul *v.* Sheldon, 35 Neb. 247; Watriss *v.* Pierce, 32 N. H. 560; Bangs *v.* Strong, 7 Hill, 250, 4 N. Y. 315; Farmers' Bank *v.* Evans, 4 Barb. 487; Eneas *v.* Hoops, 42 N. Y. Sup'r Ct. 517; Cornell *v.* Eagan, 13 Daly, 505; Northern Co. *v.* Kennedy (North Dakota, 1897), 73 N. W. R. 524; Lane *v.* Scott, 57 Tex. 367; Gardner *v.* Watson, 76 Tex. 25; Sage *v.* Strong, 40 Wis. 575 (modification of judgment); Nichols *v.* Palmer, 48 Wis. 110; Titus *v.* Durkee, 12 Up. Can. C. P. 367, *Accord.* — ED.

Whitlow v James Hall

Π agreed to rent 30 cows to Jas Hall for a year, at so much rent per annum. Jas Hall was sued for payment of rent. Shortly after contract, a new contract was made whereby Π was to furnish 28 for 6 mos, & 32 during the other part. James knew nothing of this. Π sues for rent.

It [illegible] for Δ. is [illegible] was [illegible] on this and no [illegible] in it, & Δ was not a [illegible] & in no way [illegible] to it. They are not to be, & not a modification or alteration of the original contract.

If 2d contract was a modification of original contract, would it be valid? Apparently Δ would be liable, for he is liable for yrly rent, & what diff whether he has 28 cows for 6 mos, & 32 for 6 mos, or 30 for whole year?

But under this contract it does not state for how long Δ is to have 32 cows, & this might increase amt Δ would have to pay, & so vary his rent.

Pleas: 2. On equitable grounds, that it was one of the terms of the agreement in the said condition mentioned, that the agreement should be terminated by one month's notice on either side; and that, afterwards, the plaintiff and Johnson, without the knowledge, privity, or consent of the defendant, altered the agreement and made it terminable by three months' notice on either side, and thereby materially increased the risk of the defendant as surety, and that the defaults alleged were committed by Johnson after the alteration.

3. On equitable grounds, that Johnson, before the commission of the said defaults, had committed during the said service divers other defaults of the same kind; and that the plaintiff, though well knowing the said last-mentioned defaults, wholly omitted and neglected to inform the defendant thereof, and, notwithstanding the said last-mentioned defaults, continued to employ and retained Johnson in the said service; and that the defaults alleged were committed by Johnson during the said continuance and retention of him by the plaintiff in the said service.

Demurrers and joinder.

R. G. Williams, for the plaintiff.[1]

Lewers, for the defendant, was directed to confine himself to the second plea. The second plea is good. If the agreement between the plaintiff and Johnson was altered in any respect, it became a new and different agreement, and the surety is discharged; or, rather, it becomes an agreement which the surety had never guaranteed. Tayleur *v.* Wildin.[2] But, further, the alteration was a material one; it took away from the surety the security which would be afforded to the employer (and therefore to himself) by the power of dismissing a clerk on a short notice.

KELLY, C. B. I am of opinion that there is nothing in the matters alleged in the second plea to discharge the surety. The authorities cited go to show that we are to look at the terms of the surety's engagement; not at the terms of any agreement between the employer and employed, unless these terms are made part of the surety's agreement, or unless something has been done, which, with reference to those terms, substantially alters his position. Now the plea alleges that it was a term of the contract between the employer and employed that the service should be terminable by one month's notice, and that afterwards, and before the defaults in respect of which the action is brought, they varied the contract by providing that the service should only be terminable by a three months' notice on either side. And if it clearly appeared that the surety had entered into the agreement on the faith of the original contract, that is, if notice had been given to him of the terms of the contract, and he had, after that notice, entered into this bond, he would undoubtedly have been discharged by the alteration. The case of North Western Ry. Co. *v.* Whinray[3] shows that if the

[1] The argument for plaintiff is omitted. — ED.

[2] Law Rep 3 Ex. 303.

[3] 10 Ex. 77; 23 L. J. (Ex.) 261.

agreement between the employer and employed had been made the basis of the surety's contract, and if for that original agreement another had been substituted determinable on a different event, that which was the basis of the surety's contract would be gone, and the surety would be discharged. But it does not appear that the surety ever had notice of that agreement, further than that the plaintiff had agreed to employ Johnson as traveller upon his obtaining two sureties for his "duly and faithfully accounting," and for his "faithful and honest conduct."

But the third plea raises a different question. The case of Phillips *v.* Foxall[1] clearly shows that, if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him. The question therefore is, whether the allegation of the plea shows such breaches of duty as would have entitled the plaintiff to dismiss Johnson, and would, therefore, have entitled the surety to call upon him to do so. It is said that no dishonesty is shown by the plea. That may well be; and yet the employed by failing to pay over money which he has received may commit a breach of his duty, which would entitle his employer to dismiss him. Now we must take it on the plea, reading it with the declaration, that Johnson had received for the plaintiff certain sums of money which it was his duty to pay over, and which he did not pay over, and the question is, whether that is not *prima facie* a breach of duty which would entitle the plaintiff to dismiss him. I am of opinion that it is, and that it is sufficient if the plea raises such a *prima facie* case.

MARTIN, B. I think the third plea is good on the authority of Phillips *v.* Foxall.[2]

It is my impression that the second plea is good also; for I think the declaration must be taken as meaning that the defendant was to guarantee Johnson's fidelity in that service which he entered on with the plaintiff; and I apprehend that, if afterwards the plaintiff and Johnson entered into a new contract which would cast a new liability upon the surety, the surety was discharged. Now, if by the original contract Johnson was liable to be dismissed at one month's notice, and that is afterwards altered into a contract for a three months' notice, that is a material alteration, involving a new liability in the surety, and which, therefore, if entered into without his consent, will discharge him. I do not, however, entertain this opinion so strongly as to induce me to dissent from the judgment of the Court.

PIGOTT, B. I think the second plea is no defence. It is pleaded on equitable grounds, and the fact relied on is, that the agreement between Johnson and the plaintiff was made determinable by a three months' notice instead of a one month's notice, without the knowledge or consent of the surety, whereby the risk of the surety was materially

[1] Law Rep. 7 Q. B. 666. [2] Ibid.

increased. I think the averment that the risk was materially increased is a proposition of law, an inference from the previous statement; we have to see whether that is a proper inference, so as to give the surety a defence in equity, and I am of opinion that it is not. If the creditor agrees to change the terms of his contract with the person on whose behalf the guaranty is given, and does thereby increase the surety's risk without his consent, the surety is discharged. Equally, if the surety chooses to contract on the terms of the original agreement, so as to make that agreement a material part of his contract, he is discharged by the alteration. But if (which appears to be the case here) the change of terms takes place in an agreement which is merely collateral to that of the surety, and is not made a part of it, and if it is also quite immaterial to the risk, it affords the surety no answer. Now, I think this change did not affect the surety's risk at all. If a notice were given for three months, as required by the new agreement, his risk would not extend over the whole three months, but would terminate at the end of the first month. He is therefore no worse off because of the change, and his plea therefore fails.

As to the third plea, I agree that it is good, for the reasons already given.

POLLOCK, B. I also agree that the third plea is quite within Phillips *v.* Foxall.[1]

As to the second plea, after what has been said by my Brother MARTIN, I express my opinion with some diffidence, but I think it is bad. Pleas of this kind are well known at law, and Whitcher *v.* Hall is a leading case upon the subject. In that case there was an agreement between the plaintiff and Joseph Hall for the letting of the milking of thirty cows, and that agreement was imported into the contract by which James Hall, the defendant, guaranteed to the plaintiff the payment by Joseph Hall of the rent. A change being afterwards made in the number of the cows, the surety was held to be discharged, and Bayley, J., says:[2] "The new agreement was binding only on the persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may perhaps be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is whether the contract performed by the plaintiff is the original contract to which the defendant was a party." That case (which was no doubt a very strong decision) has been acted on ever since, when the party who has become surety has taken care that the original agreement should be made part of his contract. But in the cases cited to us, where the original contract was not made part of the surety's contract, but the Court has nevertheless said that the

[1] Law Rep. 7 Q. B. 666.

[2] 5 B. & C., at p. 275.

surety was discharged, there has been some material alteration in the terms of the original agreement, in this sense, that the surety has been injured or put in a worse position by the change. It is therefore open to the Court in such cases to consider whether the alteration is a material one or not, and I am of opinion that the alteration in the present case is not so. The distinction I have adverted to was no doubt in the mind of the pleader when he pleaded this plea on equitable grounds.

Judgment for the plaintiff on the demurrer to the 2d plea;[1] *for the defendant on the demurrer to the 3d plea.*

HOLME v. BRUNSKILL.

IN THE COURT OF APPEAL, JUNE 7, 1877.

[*Reported in Law Reports, 3 Queen's Bench Division,* 495.]

COTTON, L. J.[2] This is an appeal of the plaintiff against a judgment of DENMAN, J., in favor of the defendant, Robert Brunskill. The action was on a bond for £1,000, dated the 18th of March, 1873, executed by George Brunskill, Robert Brunskill, and others in favor of the plaintiff. The plaintiff was at the date of the bond, and still is, the owner of a farm called Riggindale, and before the execution of the bond he had agreed with George Brunskill to let to him as yearly tenant Riggindale Farm, including certain hill pasture held therewith, and also a flock of 700 sheep; and the bond, in which Robert Brunskill joined as surety for George Brunskill, was given to the plaintiff to secure the delivery to him at the end of the tenancy of the flock of sheep in good order and condition. The material part of the condition of the bond is as follows: "If the above bounden G. Brunskill should, at the determination of the tenancy, deliver up to H. P. Holme, along with the said farm and premises, the like number, species, and quality of good and sound sheep as were delivered to the said G. Brunskill as aforesaid;" and "in case the said stock of sheep should, at the determination of the said tenancy, be reduced or deteriorated in number, quality, or value, should pay to H. P. Holme compensation for such reduction or deterioration, to be ascertained by certain arbitrators" in manner therein provided; and "should yearly and every year during the tenancy pay, or cause to be paid, to H. P. Holme, by way of rent or interest for the sheep, the sum of £35 by two equal half-yearly payments," then the bond should be void.

On the 9th of November, 1875, the plaintiff gave to George Brunskill a notice to quit the farm, which was in terms a notice to quit "on the 10th of April, 1876, or at the expiration of the year of your tenancy,

[1] Stewart v. McKean, 10 Ex. 675, *Accord.* — ED.

[2] Only the opinions of the Court are given. — ED.

Sanderson v Aston

Π agreed to employ Johnson as clerk upon his getting two sureties for his duly accounting to Π for money recd, & his honest conduct during service. One of terms of agreement was that either party was to give 6 months notice to other before agreement should be terminated. Δ was one of sureties.

1st plea:- that time of notice was extended to 3 months without Δ's consent, thereby increasing Δ's risk.

Ct gave judgment for Π on this. This agreement was not inconsistent with Δ's contract, & even if it was inconsistent was going to answer for [illegible], & Π's right to sue on contract not [illegible]. Dissentient must on ground that the risk of surety was not varied here at all by extension. one Judge dissented.

Rest query:- during 3 months time C would be owing wages which he could set up against the claim owing by P, & this would be a variation of S's risk, i.e. what S would have to pay. But see P. 268.

Also during 3 months time there would be more opportunity for wrongdoing on P's part for all of which S would have to be liable for, for the employment continues till the end of the 3 months.

2d & 3d plea:- That before commission of defaults alleged in declaration, agt had committed other defaults, & Π had neglected to inform Δ of them, & had continued employing agt.

Ct gave judgment for Δ on this plea. If such defaults have been committed which would entitle C to discharge P, S has it to call on C to discharge P, & if P is continued in employment, this varies risk, & surety is discharged.

Variation of risk is in possibility that P will continue his wrongdoing, making S more liable.

which shall expire next after the expiration of one half year from the service of the notice." The notice being served less than six months before the 10th of April, 1876, was ineffectual to determine the tenancy on that day, but was effectual to determine it on the 10th of April, 1877. Before the 10th of April, 1876, George Brunskill and the plaintiff met, and George Brunskill objected to the insufficiency of the notice to quit. Whereupon the plaintiff stated that he did not wish to take the farm from him, but that he wanted part of the farm called the Bog Field, and it was thereupon agreed that George Brunskill should surrender this on the 10th of April then next, and that his rent should from that time be reduced by £10 a year, and that the notice to quit should be considered as withdrawn. This agreement was carried into effect, and George Brunskill continued to hold the remainder of the farm; but early in October following, the plaintiff gave him due notice to quit on the 10th of April, 1877. Before this time arrived George Brunskill got into difficulties and had become insolvent. His trustee, sometime in March, 1877, gave up the farm, and it was then ascertained that the flock referred to in the bond was reduced in number and deteriorated in quality and value; and the action has been brought to recover from the defendant, under his bond, compensation for the diminished value of the flock.

MR. JUSTICE DENMAN, before whom the action was tried, gave judgment for the defendant, and against this judgment the plaintiff has appealed.

One ground on which the defendant relied in supporting the judgment was, that his obligation under the suretyship bond had expired before the deficiency arose, that is to say, that by the notice to quit and agreement made as to the surrender of the Bog Field, and the withdrawal of the notice, a new tenancy was created, to which the bond did not apply; and for this he relied on the case of Tayleur v. Wildin [1] as an authority, that under the circumstances a new tenancy was created; and it was on the authority of Tayleur v. Wildin [1] that MR. JUSTICE DENMAN, as we understand, principally relied, but we are unable to agree with this view. In Tayleur v. Wildin [1] the tenant continued in the occupation of the farm after the day for which the notice to quit, which was withdrawn, had been effectually given, and the rent for which the surety was sued accrued in respect of the occupation after that day, and the Court considered the continuance of the tenant's possession after that time as a new tenancy, and that the guaranty, which applied only to the old tenancy, was therefore gone. But in the present case the tenancy of George Brunskill was, in fact, determined on or before the day when, if the notice to quit had not been withdrawn, it would have ended. The deficiency and deterioration of the flock therefore occurred at the determination of the very tenancy to which the bond referred. It was, however, argued that the effect of giving up

[1] Law Rep. 3 Ex. 303.

the Bog Field must be a surrender of the old tenancy. But we are of opinion that this cannot be maintained, and that notwithstanding the surrender to a landlord of part of the land demised, the former tenancy of the remainder of the farm still continues.

It was contended by the defendant, that even if there was a continuance of the old tenancy the effect of the surrender of the Bog Field was to discharge him as surety from all liability. The Bog Field contained about seven acres, and the jury, in answer to a question left to them, at the trial, found that the new agreement with the tenant had not made any substantial or material difference in the relation between the parties, as regards the tenant's capacity to do the things mentioned in the condition of the bond, and for the breaches of which the action was brought. The plaintiff's contention was that this must be treated as a finding that the alteration was immaterial, and that, except in the case of an agreement to give time to the principal debtor, a surety was not discharged by an agreement between the principals made without his assent, unless it materially varied his liability or altered what was in express terms a condition of the contract.

In my opinion this contention on behalf of the plaintiff cannot be sustained. No doubt there is a distinction between the cases which have turned on the creditor agreeing to give time to the principal debtor, and the other cases. Where a creditor does bind himself to give time to the principal debtor, he, with an exception hereafter referred to, does deprive the surety of a right which he has, that is to say, of the right at once to pay off the debt which he has guaranteed, and to sue the principal debtor; and without inquiry whether the surety has, by being deprived of this right, in fact suffered any loss, the Courts have held that he is discharged. The exception to which I have referred is, where the creditor, on making the agreement with the principal debtor, expressly reserves his right against the surety; but this reservation is held to preserve to the surety the right above referred to, of which he would be otherwise deprived. The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of Rees *v.* Berrington:[1] "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial

[1] 2 Ves. Jr. 540.

to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in acordance with what is stated to be the law by Amphlett, L. J., in the Croydon Gas Company *v.* Dickenson.[1]

The plaintiff, in support of his contention, that having regard to the finding of the jury, the surety was not discharged, relied on various *dicta* to the effect that any material change in the contract between the principals will discharge the surety. Even if by these expressions the judges intended to state that to have the effect of releasing the surety the alteration must be material, it does not follow that they intended to lay down that no alteration would discharge the surety unless the jury, in an action to enforce his liability, held it to be material, or to express any opinion at variance with the rule laid down by me. The case of Sanderson *v.* Aston was specially relied on by the plaintiff. But Martin, B., though he did not formally dissent from the decision of the majority of the Court, was not satisfied with the judgment; and if the decision is to be considered as based on the reason given by Pollock, B., that the Court was entitled to consider whether the alteration was material, it cannot, in our opinion, be sustained.

In the present case, although the Bog Field contained seven acres only, yet it cannot be said to be evident that the surrender of it could not prejudicially affect the surety. Some of the witnesses for the plaintiff admitted that it was occasionally used for pasturing, that its loss would be appreciable in the spring, and that it might make a difference of fifteen in the number of the sheep which the farm would carry.

The case may also be considered in another point of view. The bond given by the defendant, the surety, was to guarantee the delivery up of the flock of sheep therein referred to at the determination of the tenancy of the Riggindale Farm, which, in our opinion, must mean Riggindale Farm as then demised to George Brunskill, and the bond certainly implied that he should continue to hold the farm as then demised till the flock was given up. The contention of the plaintiff, if it could be supported, would make a variation in this contract, as to the materiality of which there is at least a doubt, and would make the defendant liable for a deterioration of the flock during the time when the tenant held a smaller farm than that contemplated by the contract of the surety.

The plaintiff's counsel relied on some observations made by Lord

[1] 2 C. P. D., at p. 51.

Cottenham in the case of Hollier v. Eyre.[1] But, in fact, those observations are in favor of the defendant and not of the plaintiff. What Lord Cottenham says is, "The surety will be left to judge for himself between his original undertaking and another substituted for it, but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation." In this case, as already pointed out, the original contract of the surety was that the flock should be delivered up in good condition, together with the farm, as then demised to the tenant. No part of that which was guaranteed was ever withdrawn from the operation of the bond. But the plaintiff attempts to substitute for the contract that the flock should be given up in good condition, with the farm, as then demised, a contract that it should be delivered up in like condition with a farm of different extent. In my opinion the surety ought to have been asked to decide whether he would assent to the variation. He never did so assent, and in my opinion was discharged from liability, notwithstanding the finding of the jury, inasmuch as in my opinion the question was not one which ought to have been submitted to them.

Lord Justice Thesiger concurs in this judgment.

Brett, L. J. I speak with great deference when I say I cannot bring my mind altogether to agree with this judgment, and I feel bound to observe that I arrive at another view than that which has been expressed. As to the first part of the judgment I entirely agree. I do not think there was any new tenancy, and I ground that view on the fact of the finding of the jury, amongst other things, that the alteration was immaterial. It is the latter part of this view with which I cannot agree. In the first place, this case comes before us fettered by certain rules. We are bound to observe that it is a direct appeal from the decision of my Brother Denman, after a trial by jury; we are, therefore, not at liberty to ask whether the question he left was left in proper form. There cannot be a motion here for misdirection, and we are not at liberty to say that the finding of the jury was contrary to the evidence. It is a general rule that we have no right to look at the verdict, but accept it according to its ordinary construction. I find the question left to the jury was, whether the new agreement with the tenant, which we are told did not alter the tenancy, made a substantial or material difference in the relation between the parties as to the tenant's capacity to do the things mentioned in the bond, and for breach of which the action was brought. They not only found that, but my Brother Denman says that the matter is far more fit for the consideration of a jury of the county of Cumberland than for a lawyer, and he cannot say that he is dissatisfied with their view. Therefore there is the finding of the jury with the assent of the judge. If it were necessary to give an opinion, considering I have not an intimate knowledge of these things, but from what I know of Cumberland farmers, so far from dissenting from the opinion of the jury, I think it is a substantial finding. When

[1] 9 H. L. C. 57.

Holme v. Brunskill

Π leased farm & flock of sheep to George Brunskill as yearly tenant, & Δ joined in bond as surety, that tenant would deliver up the same number of sound sheep as Π delivered to Geo, & would be liable for any deficiency, & for the rent. Π & tenant made an agreement whereby 10 acres of original farm were to be surrendered to Π, & rent was to be reduced proportionally. At end of term sheep had deteriorated in number, & quality, tenant was insolvent, & Π sues to collect. Jury found that that new agreement made no substantial difference in tenants capacity to do the things in bond & Lowe ct gave judgment for Δ.

Wilde ct affirmed this. It must be clear on facts that new agreement will not prejudice surety, else surety will be discharged. Here this cannot be said, because 10 of sound might be brought to keep the condition of the whole up with. & there is an allotment so to uncertain value of which Π sold to a stranger, & Π is not bound to give surety's consent.

Blackburn J. went on, from 1 ltd. in view of principle of [illegible], the alteration was not material, or was material to the surety.

Notice way ct talks about releases - not in terms of causation of risk, but in terms of whether surety's contract included the provision which was altered or not. Selp-261,

Cambridge Bank v Hayes

Δs made demand note, bearing date with 7½%. Then Π's wrote across back of it, "rate of interest to be 6½% from certain date." Δs were executrix, & claim that any change in rate of interest, no matter where it is, discharges surety. Judgment for Π below.

[illegible]

one remembers how many views are taken as to farms in Cumberland, I should be inclined to agree with the jury and say it did not make any material difference. We are bound by that finding, and can act in conformity with it. Where there is a suretyship bond, and there are some alterations in the contract or relation of the parties under the bond as to guaranteeing its performance, the question is whether the alteration is not material or substantial, and whether the surety is released. I cannot bring my mind to think he is, for the law takes no notice of alterations that are neither material nor specific. The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract. My opinion is in accordance with the finding of the jury, and it will be most dangerous in this particular case to put ourselves in the place of a jury, and because we think seven acres may make a difference, or £10 a year may make a difference, to set aside the finding of the jury, which is that neither one is material or substantial. I think the surety is not released. The doctrine of the release of suretyship is carried far enough, and to the verge of sense, and I shall not be one to carry it any further. *Judgment affirmed.*

CAMBRIDGE SAVINGS BANK *v.* HYDE AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, APRIL 6, 1881.

[*Reported in* 131 *Massachusetts Reports*, 77.]

MORTON, J. This is a suit against the executors of one of the sureties upon a promissory note held by the plaintiff. By the note, which is dated October 16, 1871, the maker promises to pay to the plaintiff $6,000 on demand, with interest at the rate of seven and one half per cent per annum, payable semi-annually. At the trial, it appeared that the treasurer of the plaintiff, some years after the date of the note, having authority to do so, wrote upon the back of the note the memorandum, "Rate of interest to be 6½ per cent from Oct. 10, 1876." The defendants asked the Court to rule "that any change in the rate of interest of the note, whether made on the face of the note or by a memorandum in the margin or upon the back of the note, was a change in the terms of the contract, and a material alteration of the note such as would discharge the defendants' testator, if made without

his consent, and that the indorsement upon the back of the note in suit was such an alteration;" which ruling the Court refused.

The defendants contend, in the first place, that this memorandum thus made was a material alteration, in the sense of a mutilation, of the note, which avoided it as to all parties not consenting to it. In the cases where it has been held that a material alteration of a note or other contract avoids it, there has been some change by erasure or interlineation in the paper writing constituting the evidence of the contract, so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground of the decisions is that the identity of the contract is destroyed. Wade *v.* Withington;[1] Commonwealth *v.* Emigrant Savings Bank;[2] Belknap *v.* National Bank of North America;[3] Hewins *v.* Cargill.[4] But in the case at bar it is clear that, using the word in this sense, there has been no alteration of the note. The original note remains intact. It is in no respect altered or made different. The memorandum on the back is evidence of an independent collateral agreement, and has no more effect than if it had been written on a separate paper. Stone *v.* White.[5]

The defendants also contend that, if the memorandum is to be treated as an independent collateral agreement, yet it makes such a change in the terms of the contract as to discharge the sureties, who did not consent to it. It is clear that, if a creditor makes any agreement with the principal debtor, or does any other act which is prejudicial to the rights of the surety, the surety is discharged from his liability. Thus, if the creditor, by a valid agreement founded upon a sufficient consideration, extends the time of payment of the debt, the surety is discharged. The reason is, that such an agreement materially affects the rights of the surety, since it prevents him from paying the debt and having an immediate remedy against the principal debtor. Hunt *v.* Bridgham;[6] Agricultural Bank *v.* Bishop.[7] Mr. Justice Story states the rule to be, "that if a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged." 1 Story, Eq. Jur., § 325. The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him. Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that, if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice

[1] 1 Allen, 561. [2] 100 Mass. 376. [5] 8 Gray, 589. [7] 6 Gray, 317.
[3] 98 Mass. 12. [4] 67 Maine, 554. [6] 2 Pick. 581.

him, the surety is not discharged. Smith *v.* United States;[1] Appleton *v.* Parker;[2] General Steam Navigation Co. *v.* Rolt;[3] Bowmaker *v.* Moore;[4] Holme *v.* Brunskill.

In the case at bar, the new agreement was, that, after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of six and a half instead of seven and a half per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any time. The plaintiff could at any time have sued on the note, and the sureties could at any time have paid the note and have had a right to sue their principal at once. The agreement was merely a stipulation to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change; and that the ruling of the Superior Court to that effect was correct.

Judgment on the verdict for the plaintiff.[5]

M. F. Dickinson, Jr., & *H. R. Bailey*, for the defendants.
G. S. Hale (*C. F. Walcott* with him), for the plaintiff.

[1] 2 Wall. 219.
[2] 15 Gray, 173.
[3] 6 C. B. N. S. 550.
[4] 7 Price, 223.
[5] See Sanford *v.* Story, 15 N. Y. Misc. Rep. 536.

Similarly, an agreement by the creditor to accept less than the amount due from the debtor does not discharge the surety. Preston *v.* Huntington, 67 Mich. 139; Ellis *v.* McCormick, 1 Hilt. 313.

But a reduction of the rate of interest, or the amount of the principal by altering the language of the original contract, discharges the surety. Franklin Co. *v.* Courtney, 90 Ind. 134; Johnston *v.* May, 76 Ind. 293. — ED.

B. P. KINGSBURY, RESPONDENT, v. P. R. WESTFALL, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, JANUARY, 1875.

[*Reported in* 61 *New York Reports*, 356.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was upon a guaranty. On the 13th of September, 1855, the plaintiff leased to Messrs. Hilliard & Bourne a village lot, with the buildings thereon, situate in the village of Lyons, Wayne County, for the term of five years, commencing on the first day of October then next; to which lease Alexander B. Williams, the defendant's testator, appended his guaranty, guaranteeing the payment, by the lessees, of the rent reserved therein. On the trial, the plaintiff, after proving that the several quarters' rent commencing with the one falling due April 1, 1858, to and including the quarter falling due April 1, 1860, remained unpaid, rested. The defendant then offered to show that, on the first day of January, 1858, the buildings on said lot, which covered nearly the whole thereof, were destroyed by an accidental fire, and became thereby incapable of occupancy; and that said premises were not thereafter occupied by or under the lessees, or either of them. The defendant also offered to prove that, on the 9th day of April, 1860, after the expiration of the last quarter's rent sought to be recovered, the plaintiff and the lessees, without the knowledge or consent of the defendant, entered into an agreement, under seal, by which the plaintiff, in consideration of the lessees' release to him of the unexpired portion of the term, released all claim for the rent of the demised premises which should thereafter accrue; and that the plaintiff did not rebuild the buildings or other buildings in their place; and that the use of the demised premises after the fire was not worth, for the residue of the term, to exceed one dollar per year. These offers being severally objected to as immaterial, were each excluded; and to the ruling excluding them the defendant duly excepted. The Court directed the jury to find a verdict for the plaintiff for the amount claimed. The jury rendered a verdict as directed.

J. Welling, for the appellant.

Wm. Clark, for the respondent.[1]

GRAY, C. The next and only remaining question arises upon the exclusion of the defendant's offer, which, in substance, was, that after the rent sued for had become due, and an action was maintainable for its recovery, the plaintiff, in consideration of an assignment to him of

[1] The arguments of counsel are omitted, together with the part of opinion not relating to suretyship. — ED.

Limitations of Westlaw

Π made lease to a partnership H & B of a lot for 5 yrs, rent payable quarterly, on guaranteed payment of rent. Π re occurred after 3 yrs. discharging all bldgs, which were not subsequently occupied by lessees. After 4 3/4 yrs Π & lessees got together, and lessees released last quarter of term to Π in consideration of release of last quarters rent. Δ contended that this release should discharge him altogether. Court at gave judgment for Π

[illegible] Argument might be made that if lessees had had it to occupy & used for last quarter they might have raised enough or a considerable money with which to pay off accrued debt. — i.e. similar to principle in Holme v Brunskill — but no note. P 260.

the lessees' unexpired term in the premises, released them from the payment of the rent thereafter to accrue; and thus, as the defendant insists, so changed the agreement for the payment of rent guaranteed by him, as to discharge him not only from the payment of the rent thereafter to accrue, but from that which was then overdue, and for the recovery of which this action was brought. It is now too well settled to admit of a doubt, that a guarantor, like a surety, is bound only by "the strict letter or precise terms" of the contract of his principal, whose performance of it he has guaranteed, that he is in this respect "a favorite of the law," and that a claim against him is *strictissimi juris*. Wright *v.* Johnson.[1] If an alteration be made in a contract "in a point so material as in effect to make a new contract," without the consent of a guarantor, he is discharged. Grant *v.* Smith.[2] And if he be then sued on the original contract a good answer is, "that such contract no longer exists, it having been legally terminated by the altered or substituted contract made by the parties." The People *v.* Vilas.[3] These are authoritative statements in varied form, of a conceded cardinal principle, established to save a guarantor from being made liable upon a substituted contract to which he never assented. This just principle is now invoked by the defendant and sought to be interposed by him as a shield against the plaintiff's right to recover, not upon any portion of the contract upon which a liability was to accrue when the change was made, or upon any portion of it changed by the new arrangement, but because, as he says, the parties, the one by releasing to the lessor the residue of the term in the demised premises, and the other releasing to the lessees the rent to accrue therefor for the same unexpired term, have, without his consent, changed the contract, the performance of which on the part of the lessees he had guaranteed. It is true the contract was changed, but the obligation which the lessees undertook to perform, so far as it relates to the payment of the rent which had then accrued, was not changed; it remained in the precise terms it was before; it was, as to the then future, the executory portion of it that was abrogated.

It is not pretended that the right of the defendant to be put in possession of the vacant lot, for the unexpired term, in the place of the lessees, could, by any possibility, have resulted to his advantage. The case, then, stands in principle as if the plaintiff had, mainly as a charity to the lessees, released them from the hard fate of an accidental fire, changed the contract by releasing them from their obligation any longer to pay rent upon a property that had by accident become nearly worthless to them. This, though it should come within the letter of the rule, would, should it be applied as the defendant insists it should be, do injustice to its spirit. The obligation to pay the rent for which judgment has been recovered has not, in letter or spirit, been

[1] 8 Wend. 512, 516.
[2] 46 N. Y. 93, 96.
[3] 36 N. Y. 459, 460.

changed; nor is it pretended that any right of the defendant growing out of the contract is, so far as it relates to that obligation, in any respect altered or impaired.

The judgment appealed from should be affirmed.

All concur. *Judgment affirmed.*[1]

CALVERT, Executor, v. THE LONDON DOCK COMPANY.

In Chancery, before Lord Langdale, M. R., February 13, 1838.

[*Reported in* 2 *Keen*, 638.]

The following were the circumstances of the case: By contract, in writing, dated the 29th day of September, 1829, Robert Streather, a builder, agreed with James Warre, the treasurer of the London Dock Company, on behalf of the company, to perform certain works, which were to be commenced twenty days after notice, and to be completed in twelve months from the commencement. Streather was to provide all materials and labor, in consideration of £52,200, and being allowed to appropriate certain materials mentioned. The engineer of the company was to be the sole judge of the works, and was to employ competent persons to perform the works, if Streather failed to do so; and in that case, the costs thereof were to be deducted from the sum to become due to Streather under the contract. A provision was made for varying the price, on any variation being made in the work specified in the contract; and Mr. Ware, for the company, agreed to pay the £52,200 by instalments, — viz., three-fourths of the cost of the work certified to be done every two months, and the remaining one-fourth after the full completion of the contract.

On the 3d of November, 1829, Streather, and Warburton and Laycock, as his sureties, executed to James Warre, as treasurer of the company, their joint and several bond for the sum of £5,000, conditioned to be void if Streather should well and truly observe, perform, and keep the promises and agreements contained in the contract, which, on the part of Streather, were and ought to be performed, according to the true intent and meaning of the contract.

Notice having been given, Streather commenced the works on the 28th of December, 1829, but did not complete them in twelve months, or before the 28th of March, 1831, to which day the time for completing the works was enlarged, with the consent of Warburton and Laycock.

The time having expired, the London Dock Company gave notice to the sureties that they would be called upon to pay the £5,000, under the bond.

[1] Kingsbury v. Williams, 53 Barb. 142, *Accord*
Harberton v. Bennett, Beatty, 386 (real surety), *Contra*. — Ed.

On the 13th of April, 1831, Streather quitted the works, and soon afterwards became bankrupt.

The company alleged that they had sustained damage to the amount of more than £7,000, by the default of Streather; and in January, 1835, they caused actions to be brought against the sureties, to recover the full penalty of the bond; and in the particulars of their demand they stated that they had made payments on account of the contract, to the amount of £49,619 5*s.*, and in completing the works £18,875 3*s.* 2*d.*, making together £68,494 8*s.* 2*d.*: that there had become due to Streather, on the contract, £52,200; for varied and increased work, £3,721 16*s.* 8*d.*; and for the implements, engines, and materials he had left, £4,857 3*s.* 9*d.*, — making, in all, £60,779 0*s.* 5*d.*; and they represented the differences as the amount of their loss sustained by the non-performance of the works by Streather.

Under these circumstances the plaintiffs filed their bill; and after alleging that the referee in the action against the company had stated, that although the payments made to Streather amounted to £49,619, the value of the work done by Streather was only £36,429, they charged, that in executing the bond, the sureties considered, and had a right to consider, that the company, until the entire performance of the contract, would have retained in their hands so much of the contract price as by the contract they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond; or, at least, could not equitably recover against the plaintiffs any loss which they might have sustained by making such advances; and ought not to be permitted to sue the plaintiffs on the bond, for if they had not made such advances, they would not have sustained any loss by the non-performance of the contract.

The common injunction, for want of answer, was obtained.

The actions were tried on the 20th of February, 1836. The plaintiffs there obtained a verdict, with only nominal damages.

It was now asked that the common injunction which has been granted might be made perpetual, and that the defendants might pay the costs of suit.[1]

Mr. Tinney, *Mr. Kindersley*, and *Mr. Roupell*, for the plaintiffs.

Mr. Pemberton, *Mr. Phillimore*, *Mr. Blunt*, for the defendants, insisted that nothing had been done in this case to release the sureties; that the company had made the extra advances to the contractor, not under the contract, but as loans, which they were entitled to do, and had thereby greatly facilitated the performance of the work. That so far from prejudicing the sureties, the company had diminished their liability; for, but for these timely advances, the contract would long before have been abandoned, and the bond forfeited.

[1] The statement of the case is abridged and the argument for the plaintiffs is omitted. — Ed.

On the point of costs they said that the plaintiff's remedy was at law; and it was no justification for the prosecution of this suit, and no reason for the interference of this Court, because nominal damages only were recoverable at law. That the costs of the action had been provided for at law, and no costs ought to be given in this suit; for the point in litigation between the parties having been already decided by the Court of King's Bench, there was no ground for now making any decree.

THE MASTER OF THE ROLLS (after stating the case) proceeded: —

The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say, that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that by the advances made to him he was enabled to do more than he otherwise could have done, and that to assist him was to assist his sureties; and it was only for the purposes of affording that assistance that the company did more than they were obliged to do.

The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety, — and the answer has always been, that the surety himself was the proper judge of that, — and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

In this case, the company were to pay for three-fourths of the work done every two months; the remaining one-fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work if he did not; and thus it materially tended to protect the sureties.

What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances I think that their situation with respect to Streather was so far altered, that the sureties must be considered to be discharged from their suretyship.

Sweet v London Co

One Streatfeild contracted to erect certain works for Δ, for total price of £52,200, with certain stipulations as to inspection of work, & completion in case Streatfeild did not. Money was to be paid by instalments, every 2 months, ¾ of sum due then was to be paid, & the ¼ remaining until completion; in case Streatfeild did not finish, & some other person had to finish, then was to be deducted out of ¼ retained. Streatfeild got behind, & Δ's alleged that they advanced to him the instalments due, so that he could proceed, which he otherwise would not have been able to do. Π's are sureties on Streatfeild's bond, & allege that this discharged them. Δ's say that this is really for sureties benefit, & these does not discharge them. Bill was for injunction to restrain Δ's from suing Π's on the bond.

Injunction granted by Chancellor. This is wrong I think as taking security, & would of itself operate to compel contractor to do work thoroly. Δ's gave up that security which sureties ought to be entitled to, & this discharges sureties. Would be inspecial to surety or not, surety is to be entitled to same in either it is immaterial or not.

Is not question here, rather one of giving up of securities rather than a variation of such?

Notice also that Contractor only did work to value of £36,429, whereas Δ's had paid him £4,619. This would seem to be very negligent.

I think, therefore, that the plaintiffs are entitled to have the injunction made perpetual, and that they are also entitled to the costs of this suit.

The plaintiffs appear not to have had a complete legal defence, though they had a case which reduced the damages to a nominal amount. They could not, however, anticipate the result of the action. They had an equitable defence; and, under the circumstances of this case, if an application had been made for the purpose, I do not think that the plaintiff in equity would have been ordered to give judgment; and, after the verdict with nominal damages, the application to the Court of King's Bench made by the plaintiffs at law made it important for the defendants there to proceed with their bill in equity.[1]

WATTS v. SHUTTLEWORTH.

IN THE EXCHEQUER, JANUARY 31, 1860.

IN THE EXCHEQUER CHAMBER, JUNE 19, 1861.

[*Reported in* 5 *Hurlstone & Norman*, 235, 7 *Hurlstone & Norman*, 355.]

THE judgment of the Court was now delivered by

POLLOCK, C. B.[2] This is a rule obtained by the defendant to enter a verdict upon the issue joined on the sixth plea. The action is on a guaranty, and the breach alleged is that one Harrap had not completed certain fittings in accordance with an agreement entered into by him with the plaintiff. The sixth plea is an equitable one; and the questions which have been argued before us are, first, whether there is a defence to the action; and, secondly, whether the sixth plea was proved, that is, whether upon the evidence the verdict on the issue raised by the sixth plea ought to be entered for the defendant. The facts proved or admitted are as follows: By articles of agreement, dated the 6th of February, 1857, made between the plaintiff and Harrap, the latter agreed, in consideration of £3,450, to execute the fittings of the first

[1] Navigation Co. *v.* Rolt, 6 C. B. N. S. 550; Prairie Bank *v.* U. S., 164 U. S. 227; Board *v.* Branham, 57 F. R. 179; Bragg *v.* Shain, 49 Cal. 131; Kiessig *v.* Allspaugh, 91 Cal. 231; Chester *v.* Leonard, 68 Conn. 495; Gato *v.* Warrington, 37 Fla. 542; Finney *v.* Condon, 86 Ill. 78; St. Mary's College *v.* Meagher (Kentucky, 1889), 11 S. W. R. 609; Backus *v.* Archer (Michigan, 1896), 67 N. W. R. 913; Simonson *v.* Grant, 36 Minn. 439; Taylor *v.* Jeter, 23 Mo. 244; Evans *v.* Graden, 125 Mo. 72; Bell *v.* Paul, 35 Neb. 240; O'Rourke *v.* Burke, 44 Neb. 821; Truckee *v.* Lodge, 14 Nev. 293; Smith *v.* Molleson, 148 N. Y. 241; Mayor *v.* Brady, 151 N. Y. 611 (*semble*); Slicker *v.* Schuchert, 179 Pa. 401 (*semble*); Nat. Association *v.* Fink, 182 Pa. 52 (*semble*); City Council *v.* Ormand (South Carolina, 1897), 28 S. E. R. 147; Bell *v.* Trimby (Tennessee, 1896), 38 S. W. R. 100; Ryan *v.* Morton, 65 Tex. 258; Sanders *v.* Hambrick (Tex. Civ. Ap. 1897), 41 S. W. R. 883; Bell *v.* Moffat, 18 New Br. 406, *Accord* — ED.

[2] Only the opinions of the Court are given. — ED.

and second floors of a warehouse in Manchester, and complete the same on or before the 29th of September, 1857, according to the drawings and specifications prepared by Messrs. Travis and Mangnall, architects. After a variety of stipulations relative to the contract, there was one as follows: "That the said Samuel Watts (the plaintiff) shall and may insure the fittings from risk or accident by fire at such time and to such amount as the architects aforesaid may consider necessary, and deduct the cost of such insurance for the time during which the works are unfinished from the amount of the contract." Also, "that the said G. Harrap should and would provide to the satisfaction of the architects a good, dry, well heated, and sufficient store, for the express purpose and no other, of the reception of the fittings from time to time as each and every of them are completed and until they can be received at the said warehouse." The agreement afterwards provided that the plaintiff should pay Harrap £1,800 during the making of the fittings, between the date of the agreement and the 15th of August then next. On the 9th of February the defendant signed the guaranty. It recited in part the contract between the plaintiff and Harrap; and the defendant bound himself to guarantee to the plaintiff the due performance of the contract in accordance in all respects with the said agreement, conditions, drawings, and specifications, and such further drawings as might from time to time be provided by the architects, in a good, substantial, and workmanlike manner, and to the satisfaction of the architects, in the sum of £4,000; and that if Harrap should neglect or omit to complete the said fittings in accordance with the said agreement, conditions, drawings, and specifications to the satisfaction of the plaintiff and his architects, then the plaintiff should be at liberty to recover the said sum of £3,450, or such portion thereof as might be required to complete the work contracted for. We have stated the guaranty at some length, because it was contended on behalf of the plaintiff that it extended to a guaranty that Harrap should provide a store for the reception of the fittings until they were taken to the warehouse. It seems to us that this is not so, and that the guaranty merely extended to the doing and completing the work. The defendant was examined at the trial, and stated that he went to the office of the architects to execute the guaranty; that a clerk there read to him the articles of agreement between the plaintiff and Harrap, and stated to him that he incurred no risk in consequence of the stipulation as to the insurance; and that, thereupon, he signed the guaranty. The further facts were: that the plaintiff advanced to Harrap £1,800; that a number of fittings to the value of £2,300 were made and placed in a room in Harrap's workshop, where they were destroyed by an accidental fire; that the fittings were never put up, Harrap having become insolvent; that the plaintiff had not been repaid the £1,800, and had been obliged to pay £340 beyond the sum of £3,450 to another builder to do the work. It was admitted that the fittings destroyed were of the value before stated, and had not been insured by the plaintiff. A verdict was entered for the plaintiff for £2,140, and

leave was given to the defendant to move to enter it for him upon the sixth plea; and also that he should be at liberty to amend the plea.

The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Equity Jurisprudence, sect. 325. The same principle is enunciated and exemplified by the Master of the Rolls in Pearl *v.* Deacon,[1] where he cited with approbation the opinion of Lord Eldon, in Craythorne *v.* Swinburne,[2] that the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be a *quasi* contract; but that the right of the surety arises out of the equitable relation of the parties. The Master of the Rolls also referred to the judgment of Vice-Chancellor Wood in Newton *v.* Chorlton,[3] where he laid down that a creditor is bound to give the surety the benefit of every security he holds at the time of the contract; that the surety has a complete right to the benefit of it, and if the benefit be lost he would be discharged. It was argued on behalf of the plaintiff, that until the fittings were put into a store provided for the express purpose of their reception, the obligation of the plaintiff to insure did not attach. We think that is not so. In our opinion the contract to insure was an independent one; it precedes the contract as to the store in the agreement, and it is in no way made to depend upon it. Indeed there is evidence that the fittings were in a place satisfactory to the architects; and, as between the plaintiff and the defendant, the surety, we think that the plaintiff ought to have been active to see that a proper store had been provided. The architects were his agents. It was also argued that the stipulation to insure was not obligatory. But we cannot adopt this view. We think the plaintiff ought to have insured. It therefore seems to us that the plaintiff has omitted to do an act which his duty towards the defendant required him to do; that if he had done it the defendant would have been relieved to the extent of the insurance; that the omission therefore was injurious to him, and that he has been thereby discharged from the suretyship.

No distinction was taken in the argument between the £1,800 and the £340 paid to the new contractor. It was also argued that the statement of the architects' clerk to the defendant before the signing the guaranty was not admissible in evidence. We rather think it was; but whether or not is quite immaterial. The articles of agreement were read to the defendant. This evidence was clearly properly receivable, and was quite sufficient evidence of the averment in the plea to which the statement of the clerk is applicable. Indeed the whole of this evidence becomes immaterial because, according to the cases of Pearl *v.* Deacon and Newton *v.* Chorlton, the right of the surety exists whether he knew of the stipulation to insure or not.

[1] 24 Beav. 186, 191. [2] 14 Vesey, 164, 169. [3] 10 Hare, 651.

The remaining question is merely whether the sixth plea is proved. It has been slightly amended in pursuance of the leave reserved. We are of opinion that the evidence given at the trial is sufficient to entitle the defendant to have the verdict entered for him on the issue on the sixth plea, as amended. The rule will therefore be absolute to enter the verdict for the defendant upon the sixth plea. *Rule absolute.*

The judgment of the Court of Exchequer Chamber was now delivered by

WILLIAMS, J. — In this case the Court, at the close of the argument, was unanimous in thinking that the defendant, as surety, was discharged by the plaintiff's omission to insure. But some doubts were felt whether the discharge ought to be regarded as total, or only to the extent of the damage which could be shown to have been sustained by the surety in respect of that omission. In support of the latter view, it was contended, on behalf of the plaintiff, that the present case is analogous to that of a creditor who has lost or given up to his debtor a security which he has in his hands, where the surety is held to be thereby discharged, because of the rule that a surety is entitled to the benefit of all the securities which the creditor has against the principal; not however *in toto*, but only to the extent of the security so lost or given up.

But on consideration we are all of opinion that, in the present instance, the discharge of the surety, being effected by reason of his position having been deteriorated in respect of having been made responsible for an uninsured principal, in lieu of an insured one, the case is analogous to those where a surety has been held discharged by time having been given to the debtor, as in Samuel *v.* Howarth, and other cases, such as Eyre *v.* Bartrop,[1] Calvert *v.* The London Dock Company, and The General Steam Navigation Company *v.* Rolt,[2] where the creditor had so conducted himself as to alter the situation of surety, and the surety was held to be thereby totally discharged. We are therefore of opinion that the judgment of the Court of Exchequer must be affirmed. *Judgment affirmed.*[3]

[1] 3 Madd. 221.

[2] 6 C. B. N. S. 550.

[3] In the following cases, as in the principal case, a breach of contract by the creditor had the effect of discharging the surety. Watson *v.* Alcock, 4 D., M. & G. 242; Lawrence *v.* Walmesley, 12 C. B. N. S. 799; Pioneer Co. *v.* Freeburg, 59 Minn. 230; Morrison *v.* Arons, 65 Minn. 321; Carson Association *v.* Miller, 16 Nev. 327; Belfast Co. *v.* Stanley, Ir. R. 1 C. L. 693, 698 (*semble*). — ED.

Watts v Shuttleworth

Π & one H. made agreement, whereby H. was to furnish fittings for a warehouse of Π's, & was to insure them from fire, & deduct cost from contract price. goods were destroyed while in work shop of H. & Π had to expend considerable sums in getting more. Π had neglected to make insurance, & Δ's contended that they were discharged by this Δ's being sued for the non performance of contract. & might indemnify after by, & could get complete, & gave judgment, for Δ's. Π was under a duty to insure by virtue of the contract here, & his omission to do so has prejudiced the surety. This discharges surety to the full extent, & not to extent he has been actually injured.

Notice that surety here would have been subrogated to Π's claim against mo co, had he paid, & had insurance been effected. But by Π's failure to act, he has no rt of subrogation.

State's recovering suit

Δ's were sureties on a tax collector's bond, π, suing alleging that collector had failed to pay over as law required, Δ's pleaded that by act of leg. time for payment by tax collector to State had been changed, & thus discharged Δ. Judgment for π below.

At year's segment for Δ. It is known if date to change day of payment is one of terms in the contract, & sureties must be taken to have agreed to the exercise of this st by legislature.

THE STATE, USE OF HOLMES COUNTY, v. S. W. SWINNEY AND OTHERS.

IN THE SUPREME COURT, MISSISSIPPI, OCTOBER, 1882.

[*Reported in* 60 *Mississippi Reports*, 39.]

APPEAL from the Circuit Court of Holmes County.

Hon. C. H. CAMPBELL, Judge.

On the 13th of March, 1882, an action was brought in the name of the State, suing for the use of Holmes County, against J. S. Hoskins and his sureties, on his bond as tax collector of that county, for two several sums of money, for the years 1876 and 1877 respectively, which, it was declared, he had collected and failed to pay over to the treasurer of the county as the law required of him and as he was bound by the terms of his bond to do.

The third plea set up the defence of the sureties that, "after the signing of said bond by said defendants, the said plaintiff, without the consent of the said defendants, on the twelfth day of January, 1877, by an act of the Legislature of the State of Mississippi, approved on said day, and entitled 'An Act to provide for the collection of the outstanding revenue for the fiscal year 1876,' altered, changed, and extended the time for the collection of taxes due the State of Mississippi and the county of Holmes, and the time for the payment thereof by the said Hoskins to the State and county treasuries; whereby said defendants were released as sureties on said bond."[1] The plaintiff declined to plead over and appealed to this court.

C. V. Gwin, for the appellant.

H. S. Hooker, for the appellees.

CAMPBELL, C. J., delivered the opinion of the Court.

We decline to follow the courts of Illinois, Tennessee, and Missouri, in their views that sureties on the bond of a tax-collector are discharged by an act of the Legislature passed after the execution of the bond, without their consent, giving further time for the collection of taxes and settlement by the officer, and we embrace and declare the more just and politic doctrine of the courts of Virginia, Maryland, and North Carolina, and hold that the official bond of the tax-collector is given with a full knowledge of the right of the Legislature to alter the dates fixed by law for the collection of taxes and the settlement of the collector, and subject to the exercise of that right at the pleasure of the Legislature, without the assent of the sureties. The Commonwealth *v.* Holmes,[2] Smith *v.* The Commonwealth,[3] The State *v.* Carleton,[4] Prairie

[1] The statement is abridged and the arguments of counsel are omitted. — ED.

[2] 25 Gratt. 771.

[3] 25 Gratt. 780.

[4] 1 Gill, 249.

v. Worth.[1] See also Smith v. Peoria,[2] Bennett v. The Auditor;[3] Cooley on Tax. 502.

The demurrer to the third plea should have been sustained.[4]

[1] 78 N. C. 169. [2] 59 Ill. 412. [3] 2 W. Va. 441.

[4] State v. Carleton, 1 Gill, 249; Prairie v. Worth, 78 N. C. 169; Worth v. Cox, 89 N. C. 44; Commonwealth v. Holmes, 25 Grat. 771; Smith v. Commonwealth, 25 Grat. 780; Bennett v. Auditor, 2 W. Va. 441, *Accord*.

Davis v. People, 6 Ill. 409; People v. McHatton, 7 Ill. 638; State v. Roberts, 68 Mo. 234; Schuster v. Weiss, 114 Mo. 158, 169; Johnson v. Hacker, 8 Heisk. 388, *Contra*. — Ed.

SECTION X.

Non-disclosure by Obligee of Facts which he ought to reveal to the Surety.

SMITH AND OTHERS, APPELLANTS, *v.* GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND, RESPONDENTS.

IN THE HOUSE OF LORDS, JUNE 9, 1818.

[*Reported in* 1 *Dow*, 272.]

THE appellants had bound themselves in a bond of cautionry to the Bank of Scotland, for one Paterson, the bank agent at Thurso. Paterson having mismanaged the affairs of the bank, and become bankrupt, the respondents proceeded to enforce the bond. The appellants resisted payment, presented a bill of suspension against a threatened charge, and raised an action of reduction of the bond. In both questions the Court of Session pronounced against the cautioners (appellants), who thereupon lodged their appeals.

The appellants alleged that the bond had been obtained by concealment and fraud, inasmuch as the bank company at the time of its execution were aware of, or had strong reason to suspect, the misconduct and insolvency of Paterson. The Court below rejected the evidence offered in support of this allegation.[1]

Sir S. Romilly and *Mr. Brougham*, for the appellants.

Mr. Adam and *Mr. Horner*, for the respondents.

LORD ELDON, C. The next question related to the materiality and effect of the circumstances offered to be given in evidence in regard to this bond. If an agent had been guilty of embezzlement, or other improper conduct unknown to his employer, the cautioner would be liable. But if a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent.

One case, similar to the present, had come before himself (Maltby's case). A clerk to the Fishmongers' Company had incurred a consider-

[1] The case has been materially abridged; the arguments of counsel and the concurring opinion of Lord Redesdale are omitted. — ED.

able debt. The deficit had been increasing from year to year, and was at length carried beyond what the company were likely to recover. They demanded additional security, which he procured. The case had come before him only upon motion, but he had thought a good deal upon it, and the light in which it appeared to him was this: If he knew himself to be cheated by an agent, and concealing that fact, applied for security in such a manner and under such circumstances as held him out to others as one whom he considered as a trustworthy person, and any one, acting under the impression that the agent was so considered by his employer, had become bound for him, it appeared to him that he could not conscientiously hold that security. He was then of opinion that the Fishmongers' Company could not hold their security. He did not know what had become of the case afterwards, but he believed that his opinion was submitted to, and that no further proceedings were had. He had since reconsidered the matter, and still retained his former opinion, and would act upon it judicially, if occasion offered. He therefore thought that an opportunity ought to be afforded to these cautioners to prove the facts which they alleged and offered to substantiate by evidence.

JOHN PIDCOCK AND OTHERS v. BISHOP.

IN THE KING'S BENCH, JANUARY 29, 1825.

[*Reported in* 3 *Law Journal Reports, King's Bench,* 109.[1]]

DECLARATION: In assumpsit on a guarantee.

Plea: General issue.

It appeared, at the trial before Mr. Baron Hullock, at the Spring Assizes, 1824, for the county of Warwick, that the plaintiffs were manufacturers of pig-iron at Lightmoor, in Shropshire; that the defendant was a dealer in iron, residing at Bankside, London; and that the guarantee was contained in a letter dated 16th December, 1822, and addressed by the defendant to the plaintiffs in the following words:—

"At the request of Mr. Thomas Tickell, I beg to inform you that I will guarantee you in the payment of £200, value to be delivered to him in Lightmoor pig-iron."

It further appeared that Tickell had been supplied with 20 tons of Lightmoor pig-iron, of the value of £82 10*s.*, and was unable to pay.

It also appeared that Tickell had been a bankrupt, and was indebted to John Pidcock, one of the plaintiffs; that after the bankruptcy, in December, 1822, John Pidcock agreed with him, that if he could find a guarantee, the plaintiffs should supply him with pig-iron, in an understanding known to all the plaintiffs, that he should pay ten shillings per ton more than the market price, which excess should go in liquidation

[1] s. c. 3 B. & C. 605. — ED.

Smith v Bk of Scotland

Smith was surety on bond of Patison, an agt for the Bk of Scotland, Paterson managed Bk & Bk tries to hold surety, Paterson having become insolvent. Δ's offered evidence that bond had been obtained by concealment, ~~that~~ since co had knowledge, or suspected misconduct of Patison at that time.

It held that Δ ~~et~~ to be allowed to show [illegible] that Π had knowledge but not to be allowed with a person, & was so considered by employer; in such case it is inequitable to hold surety.

Pideock v Bishop

One Tichell owed debt to Π, & then went Bkrupt. Then Π agreed to sell him iron, if he could find a guaranty, the price to be 10s more than market price, this 10s to go to payment of old debt. A wrote guaranty "I will guarantee you in the payment of £200, value to be delivered to him (Tichell) in iron." Value of iron delivered was £182. Π added £10 under agreement. Π tried to recover for £182. Lower ct gave judgment for Π. K.B. reversed this, & gave judgment for Δ. Contract would absorb a part of money going to pay debt, as understood by surety, to assignment of old debt, for which Δ is not liable. It is a precedent as to S & wrongs to land.

of the old debt due to John Pidcock; that such agreement was not communicated to the defendant; but a bill of parcels was sent to Tickell thus: "To 20 tons of Lightmoor pig-iron, £82 10*s.* To Mr. Pidcock, debt, £10. Total, £92 10*s.*"

On the part of the defendant it was said that this agreement was a fraud upon the defendant, and vitiated the guarantee.

The learned judge overruled the objection, and the jury found a verdict for the plaintiffs for £82 10*s.*; but leave was given to move to enter a nonsuit.

Mr. Clarke and *N. R. Clarke* showed cause against a rule *nisi*, for entering a nonsuit, and endeavored to distinguish this case from Jackson *v.* Duchaire.[1]

By the COURT. We are all of opinion that a person giving a guarantee ought to be informed of every circumstance which may vary the degree of his responsibility. The defendant might reasonably suppose that the iron would be supplied to Tickell at the market price; but by this bargain he was to pay ten shillings beyond the market price, in liquidation of his debt to John Pidcock, and thus he would appropriate to the payment of the old debt a fund which the surety might reasonably suppose would discharge the debt for which he was collaterally responsible. It is clear, as in the case of a composition deed, that a contract which is a fraud upon a third person is void on that account as between the parties to it.

The object of a person becoming a surety for another is to do him a service; but in this case this private bargain would defeat that intention.

Rule absolute.[2]

E. RAILTON, APPELLANT, *v.* T. G. MATHEWS AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, JUNE 14, 1844.

[*Reported in* 10 *Clark & Finnelly*, 934.]

"THE appellant became surety in a bond for the fidelity of one Hickes to his employers, the respondents. Hickes being in default, an action was brought against the surety, who raised an action for reduction of the bond, on the ground that the respondents, although well aware of the fraudulent misconduct of Hickes in a previous employment by them, failed to make known this fact to the surety at the time he executed the bond. An issue was directed" "Whether the pursuer, E. Railton, was induced to subscribe the bond by undue concealment or deception on the part of the defenders, or either of them?"

The Lord Justice Clerk directed the jury that under this issue "the

[1] 3 Term Rep. 551.

[2] See *Ex parte* Sharp, 3 M., D. & D. 490, 504, per Knight Bruce, C. J. — ED.

concealment must be, first, of things known to the defenders, or which they had strong and grave ground to suspect; secondly, that the concealment therefore being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive."

The jury found a verdict in favor of the respondents, and, in effect, sustained the bond; whereupon the appellant's counsel took an exception to the learned judge's direction to the jury.

The bill of exceptions was argued before the Lords of the Second Division, who, by the interlocutor of the 31st of January, 1844, disallowed the same,[1] and refused to grant a new trial, and appointed judgment to be entered up on the verdict.

The appeal was against that interlocutor.[2]

LORD COTTENHAM. It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of Smith *v.* The Bank of Scotland, that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond; and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts, would invalidate the obligation and release the surety from the obligation into which he had entered.

Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause, or the facts proved, or the conclusion to which the jury might or might not have come under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, "whether the pursuer, Edward Railton, was induced to subscribe the bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them;" raising these two propositions which were raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

The question — looking at the terms in which the matter was left to the jury, and the mode in which the learned judge informed the jury they ought to perform their duty — is whether there may not have been a case brought before the jury for their consideration of improper and undue concealment (which I understand to mean a non-communication of facts which ought to have been communicated), which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party

[1] 6 Bell, Murray, Young, & Tennant, pp. 540–565; s. c. 16 Dunbar, Beveridge, & Fordyce, 252.

[2] The statement of the case has been abridged, and the arguments and portions of the opinions are omitted. — ED.

was thereby to receive. That which I find here extracted from the charge of the learned judge, I understand to be one proposition. The learned judge lays it down distinctly that the concealment, to be undue, must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive. The charge, therefore, I conceive, was not consistent with the rule of law; I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

LORD CAMPBELL. The question really is, What is the issue which the Court directed in this case? "Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?" The material words are, "undue concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond; there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond appears to me preposterous; for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial.

Then we come to the direction given by the learned judge. He says, "The concealment, therefore, being undue, must be wilful and intentional, with a view" (and that is with reference to the motive) "to the advantage they were thereby to receive." Now, according to my notion

of the issue, that is an entire misconception of it; according to this direction, although the parties acquiring the bond had been aware of the most material facts which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them, — that is to say, if they had forgotten them, or if they thought by mistake that in point of law or morality they were not bound to disclose them, — then, according to the holding of the learned judge, it would not be a concealment. But the learned judge does not stop there; he goes on, "with a view to the advantage they were thereby to receive;" introducing those words conjunctively, and, in effect, saying that it was not an undue concealment unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hickes, — to keep back, from those who it was material to him should continue to have a good opinion of him, the knowledge of those facts; that it was a pure kindness on their part, to prevent those parties entertaining a bad opinion of him, and not from any selfishness, this concealment took place. Although that might be the motive, yet the fact that he was in arrear and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If those were held back merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect in point of law would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional with a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Interlocutor complained of reversed; bill of exceptions allowed; and a new trial directed.

THE NORTH BRITISH INSURANCE CO. *v.* LLOYD.

IN THE EXCHEQUER, NOVEMBER 25, 1854.

[*Reported in* 10 *Exchequer Reports*, 523.]

THE judgment of the Court was delivered by

POLLOCK, C. B.[1] The plaintiffs in this case had lent £10,000 to Sir T. Brancker on the 26th of August, 1846, payable in a year, on the deposit of some shares, with a stipulation that, if the market value of

[1] Only the opinion of the Court is given. — ED.

Raulton v Mathews.

One Sluckes was employed by Δ. Π became surety on a bond for due performance & faithfulness of Sluckes. On his default Δ sued Π, & now Π raises an issue in reduction of bond, that Δ's were well aware of fraudulent conduct of Sluckes on a previous employment of him, & failed to make this known to Π. Question was whether this was undue concealment on Δ's part. Court instructed jury that concealment of known or suspected facts was enough if it was wilful & intentional, with a view to advantage to Δ. Verdict for Δ below (employer).

Ct reversed this & ordered new trial. Motive of Δ makes no difference, whether fraudulent, or intentional, or with a view to advantage. Question is only did Δ conceal these facts which he ought to have told Π. Motive is of no importance to surety, for his protection cannot depend upon whether [illegible] in mind of employer, or his [illegible] upon the information, or [illegible]

North British Ins Co v Lloyd

Π's loaned money to Thos. Brancher, on a guaranty by his brother James. Jas. then wished to withdraw, & to replace his guaranty, & Π consented to this, & guaranty of Δ was substituted, Δ not knowing anything about a previous guaranty by the brother. Δ contended ~~that~~ this was a material concealment of facts which ought to have been communicated to Δ.

Ct gave judgment for Π. Concealment was not of a material circumstance here, such as should have been disclosed by a Bk to the surety. Even tho material, this would not discharge Δ, because not made with a fraudulent intent, i.e. fraudulent as to the Δ's.

the shares should fall £20 per cent below £10,000, he should furnish new shares, or pay their value, so as to leave a surplus of £20 per cent. The shares having fallen in value below that amount, the defendant and three others, in consideration of the plaintiffs not requiring a deposit of shares to secure the deficiency, guaranteed the plaintiffs to the amount of the deficiency, each being liable for a certain share — the defendant to the amount of £500.

The action was founded on this guaranty. There was a plea of fraud.

On the trial before my Brother CROWDER, the evidence in support of the plea was, that, when the loan was due, a new agreement was made, to forbear to call for the £10,000 for six months more, on having the additional security of Sir Thomas Brancker's brother, James Brancker, for £2,000, which was given to the plaintiffs. In January, 1848, James Brancker wrote to the plaintiffs' manager, to inform him they were making arrangements to replace his security by the guaranty on which this action is brought; mentioned the terms of it and the proposed names of the sureties; and the manager received the proposed security as a substitute. The defendant knew nothing of this arrangement with James Brancker. Sir Thomas Brancker called on him and informed him of the loan to him and its terms, and told him, that, unless he could procure security, the plaintiffs would sell his shares; and then the defendant and others gave the guaranty (the subject of this action) drawn by the plaintiffs' attorney.

Mr. Knowles submitted that the plea of fraud was proved; that, in case of a surety, all material circumstances known to the creditor must be disclosed; that the non-disclosure of the fact that Sir Thomas Brancker's brother had withdrawn his guaranty and substituted the one in question was the undue concealment of a material fact, and therefore a constructive fraud. My Brother CROWDER was of opinion that the non-disclosure of material circumstances was not constructive fraud, but proposed to reserve the point. But, in the first instance, he left the question to the jury, whether this circumstance, that the debtor's brother had been a surety for him to the plaintiffs and withdrawn his suretyship, was a material matter, which ought to have been disclosed by him. The defendant swore that he would not have given his guaranty had he been informed of the substitution.

The jury found that the substitution was not a circumstance material to be disclosed, and therefore the question proposed to be reserved did not arise. But, notwithstanding that finding, Mr. Knowles still contended that it was material, and that in the case of sureties the non-disclosure of such a circumstance was a constructive fraud.

We are all of opinion that it was not. It seems to us an incorrect proposition, that the same rule prevails in the case of guaranties as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment. This is peculiar to the nature of such contracts, in which in general the assured knows, and

the underwriter does not know, the circumstances of the voyage or the state of health.

The cases decided by Lord Eldon, and afterwards by Lord Cottenham, which were cited by Mr. Knowles as containing the doctrine that there is an obligation on the part of the person guaranteed to disclose all material matters, proceeded on the ground of actual fraud.

In Smith *v.* The Bank of Scotland, decided by Lord Eldon and Lord Redesdale, they evidently proceeded on the ground of a representation to the surety of trustworthiness in the principal known or believed by the bank to be untrue; and in Railton *v.* Mathews, the point decided by the concurrent opinion of Lord Campbell and Lord Cottenham was, in effect, that it was not necessary, in order to render a concealment by a person fraudulent, that it should be made with a view to the advantage that person was thereby to receive, the Lord Justice Clerk having left that to the jury, as part of a more complex definition of fraud.

Again, in Pidcock *v.* Bishop (which was cited by Mr. Knowles), though some expressions were used by Mr. Justice Bayley as to the necessity of communicating to the surety all material facts likely to affect the degree of his responsibility, these expressions must be understood with respect to the facts of the case, which was decided on the ground of actual fraud. But that the mere relationship of creditor and surety requires in all cases a full disclosure of all material circumstances was distinctly denied by the Lords, in the case of Hamilton *v.* Watson,[1] relative to an advance by bankers, and particularly by Lord Campbell, who declares, that if the principles contended for, that everything should be disclosed by the creditor that is material for the surety to know it would knock up transactions in giving security on a cash account, because no bankers would rest satisfied that they had a security for the advance they made. "If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept — whether the debtor was in the habit of overdrawing — whether he was punctual in his dealings — whether he performed his promises in an honorable manner; for all these things are extremely material for the surety to know. But, unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor to whom the suretyship is to be given to make any such disclosure." Lord Truro, who, in the case of Owen *v.* Homan,[2] says that he thinks the principles which govern assurances are applicable to sureties, stated it under the impression that neither the text-books nor decisions defined the nature of the obligation of the creditor with regard to the circumstances to be disclosed. His Lordship apparently was not aware of the decision above referred to of Hamilton *v.* Watson.

We think the doctrine laid down by Lord Campbell perfectly correct

[1] 12 Cl. & F. 109. [2] 3 Mac. & G. 378.

and applicable to the guaranty in question. The non-disclosure of the circumstance of the change of security, even if it had been material, would not have vitiated the guaranty unless it had been fraudulently kept back; and there was no ground to impute fraud in fact to the plaintiffs or their agents. They might well have supposed that the desire of Mr. J. Brancker to get rid of his own guaranty did not indicate any bad opinion of his brother's character or solvency, but arose from a wish on other grounds to contract his liabilities,

The rule must therefore be refused. *Rule refused.*[1]

LEE AND ANOTHER *v.* JONES.

IN THE EXCHEQUER CHAMBER, TRINITY VACATION, 1864.

[*Reported in* 17 *Common Bench Reports, New Series*, 482.]

THE facts were as follows: Under an agreement of the 1st of November, 1856, James Packer had been for five years a commission-agent of the plaintiffs for the sale of coals to be delivered by them to his order, on the terms that he should from time to time give to the plaintiffs his bills for the amount of the coals so delivered, and pay to them within six days of its receipt all money received by him from customers for such coals, to be taken off and credited upon the bill so to be given by him. And by an agreement of the same date, between the plaintiffs and Sarah Tinson, the mother of Packer, she had become surety to the plaintiffs to the extent of £300 for the due performance by Packer of his agreement. Packer, not having for a very considerable time "carried out his agreement by settling for and paying up his bills at the expiration of the months during which they were current," had become debtor to the plaintiffs in the sum of £1,332, and Sarah Tinson on her guaranty

[1] In the following cases the surety was not exonerated although the creditor failed to disclose to him certain facts which, if known, might well have deterred him from becoming surety: —

Non-disclosure to a surety for a borrower that the latter was already indebted in a large amount to the lender. Hamilton *v.* Watson, 12 Cl. & F. 109. See also Guardians *v.* Strother, 22 Law Times, 84.

Non-disclosure to surety for lessee that lessee was in arrears on a prior lease. Roper *v.* Cox, L. R. 10 Ir. 200; Wythes *v.* Labouchere, 3 DeG. & J. 592, 608–9; Palatine Co. *v.* Crittenden, 18 Mont. 413.

Non-disclosure to the surety that the principal was financially weak or insolvent. Magee *v.* Manhattan Co., 92 U. S. 93; Van Arsdale *v.* Howard, 5 Ala. 596; Ham *v.* Greve, 34 Ind. 18; Farmers' Bank *v.* Braden, 145 Pa. 473.

Non-disclosure that principal was gambling. Atlas Bank *v.* Brownell, 9 R. I. 168.

Non-disclosure to surety on a note for a prior debt of the principal that creditor was taking a note for the residue without a surety. Booth *v.* Storrs, 75 Ill. 438.

Non-disclosure to surety for a purchaser of land that there was to be no vendor's lien, if, as was the fact, that was no fraudulent motive on the part of the seller. Warren *v.* Branch, 15 W. Va. 21. — ED.

for him had become their debtor to the extent of £300, when the plaintiffs informed Packer that they wanted further security, and could not without it continue him in their employment, and stipulated with him that the defendant and the other parties sureties with him in the agreement sued upon, should by their several and continuing guaranties give the plaintiffs further security to the extent of £300 against the said James Packer. In pursuance of this stipulation, the plaintiffs caused the agreement sued upon to be prepared. Although, in legal construction, it extends to defaults already made, as well as to defaults which might be in the future made, it gives no intimation in any part of it of an intention that it should operate retroactively, or of any ascertained default on which it could so operate. It is silent on the fact of the breach by Packer of his agreement that he would for the coals delivered to his order give from time to time his acceptances, and take them up at the expiration of the months during which they were current; on the fact that, by not having done so, he had incurred a debt to the plaintiffs of £1,332, and involved Sarah Tinson in a liability for £300; on the fact that the plaintiffs had informed him that he must give them further security or relinquish their employment; on the fact that the defendant, on his signature of the agreement, would, not contingently only on future defaults, but at once, become liable for £100: and none of these facts, of which the defendant was entirely ignorant, were communicated to him by the plaintiffs. Nor was any opportunity for inquiry of them, or of those who represented them, afforded to the defendant. The plaintiffs personally had no communication with him, and never saw him: it was left to Packer, whose employment and livelihood, as well as the liability of Sarah Tinson, were at stake, to obtain the consent of the defendant and of the other sureties, in the best way he could, and as he thought proper; and the collector of the plaintiffs, who was sent round with the agreement to procure the signatures of the defendant and of the other sureties, had no authority to answer questions.[1]

BLACKBURN, J. I am of opinion that in this case the decision of the Court below should be affirmed.

The question is, whether, under the circumstances stated in the case, there was evidence to go to the jury in support of the averment of fraud; for I think that the averments of undue concealment carry the case no further, and that, unless actual fraud was proved, the substance of the issue was not proved.

It was decided in The North British Insurance Company *v.* Lloyd, that the rule that all material circumstances known to the assured must be disclosed, is peculiar to contracts of insurance, and that it does not extend to contracts of guaranty.

I concur in this, which I think founded upon principle as well as authority. It was pointed out by the Chief Baron in the argument in the present case, that a surety is in general a friend of the principal

[1] This statement of the case is taken from the opinion of SHEE, J. — ED.

P was accustomed to buy coal from C & sell it again, paying C by bills he took up during month current. X was surety on this contract. P got behind so that he owed C large amt as did X also on contract of suretyship. C refused credit to P & also refused to continue to employ P as commission-agt unless P secured another surety. P got Df. Df did not know of P's indebtedness nor was this recited in the instrument drawn up by C & sent by him to Df to sign.

Held: Facts under circum a representation & ∴ fraud & conceal facts a quest. properly submitted & verdict for Df sustained.

debtor, acting at his request, and not at that of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all the information which he requires: and I think that great practical mischief would ensue if the creditor were by law required to disclose everything material known to him, as in a case of insurance. If it were so, no creditor could rely upon a contract of guaranty, unless he communicated to the proposed sureties everything relating to his dealings with the principal, to an extent which would in the ordinary course of things be so vexatious and annoying to the principal and his friends, the intended sureties, that such a rule of law would practically prohibit the obtaining of contracts of suretyship in matters of business. This is well pointed out by Lord Campbell in his judgment in Hamilton *v.* Watson.[1] But I think, both on authority and on principle, that, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described And if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part.

I think that it appears in Hamilton *v.* Watson that such was the opinion of Lord Campbell; and I think that on this principle are founded the judgments of Lord Eldon in Smith *v.* The Bank of Scotland, and of the Court of King's Bench in Pidcock *v.* Bishop.

In the present case the plaintiffs had no personal communication with the defendant, the surety; and when they sent the agreement to him for execution, they sent it by an agent who had no authority from the plaintiffs to make any statement whatever, or to do anything more than obtain the defendant's signature to the agreement thus sent.

The argument for the plaintiffs before us was, in substance, that, under such circumstances, though there might be a concealment or non-disclosure of material facts, there was not and could not be any misrepresentation on the plaintiffs' part; and that, without it, there could be no fraud: and during the argument I was inclined to be of that opinion; but, on consideration, I have come to the conclusion that in this case there was evidence of intentional deceit, by a false representation of the kind I have above referred to, amounting to actual fraud.

The written agreement which before it was executed the plaintiffs sent to the defendant, recites that Packer, the principal, had been for some time salesman to the plaintiffs on terms by which he was, in substance, to be a *del credere* agent, settling and paying for what he had sold monthly, and that they had required from him security to induce

[1] 12 Cl. & F. 109.

them to continue him in the employment, and stipulated that the defendant and others should give them a floating and continuing guaranty for the term of three years from the date thereof, to secure the amount of any balance which might at any time be due to them on the coal account.

I think this was evidence of, or rather, if not qualified by other matters, amounted to a representation that there was nothing in the transaction between the plaintiffs and Packer which might not in the ordinary course of affairs be expected to have taken place between them as parties to such a transaction.

It is stated in the case (par. 8) that, at the time when this agreement was sent to the defendant, a balance of £1,332 was actually then due from Packer, he not having for *a very considerable time* settled for and paid up at the expiration of the current months, as stipulated by the agreement. It is, however (in favor of the plaintiffs), further stated that there was no evidence that the plaintiffs were aware that Packer had actually received the money from the customers.

Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think, on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In Hamilton *v.* Watson the transaction was a security for a banker's cash account; and the decision of the House of Lords was, that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not.

In Smith *v.* The Bank of Scotland, where the security was given for the good behavior of a bank agent, it was held that an allegation that the bank knew that the principal had misconducted himself in his office, and that this fact was concealed from the sureties, ought to have been admitted to proof in the court below. I think the effect of Lord Eldon's judgment in that case is, that it was so little to be expected that a bank would continue in their service an agent who had already by breach of trust run into their debt, that the application for security amounted, as he says, to "holding him forth to the sureties as a trustworthy person."[1]

I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury. If in this case the amount of the balance already due had been small, or the period during which the accounts were left unsettled short, there would in my opinion have been such a mere scintilla of evidence as would not have warranted the jury in finding the verdict of fraud; and the judge would have been justified in withdrawing the question from their consideration. But, as it is, the amount of

[1] 1 Dow, 292.

the balance already due being, relatively to the amount of the security, so large, and the period during which no settlement had taken place being so considerable, I think the judge could not have withdrawn the case from the consideration of the jury, who might well come to the conclusion that the sending of the agreement in these terms amounted to an inaccurate representation. This would not be enough to support the verdict on the plea of fraud, unless it was further established that the plaintiffs made the inaccurate representation, intending to deceive the defendant, and induce him to enter into the contract in the belief that what was represented did exist, whilst the plaintiffs knew it did not exist. But of that also I think there was sufficient evidence.

The improbability that any one could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it: and if the jury so thought, they might from that alone draw the inference that the representation was fraudulently intended to deceive. This is strengthened by the facts that the plaintiffs apparently avoided having any personal communication with the proposed sureties, and sent the agreement for execution by an agent who had no authority from them to make any statements; from which the jury might perhaps draw the further inference that the plaintiffs took pains to avoid the risk of the sureties asking questions and being undeceived.

It is not essential, to constitute fraud, that there should be any misleading by *express words;* it is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract, by leading him to believe that which the plaintiffs knew to be false, the plaintiffs knowing that, if he had not been thus misled, he would not have entered into the contract.

For the reasons above given, I think there was in this case evidence to support the verdict; and consequently the judgment, in my opinion, should be affirmed.[1] *Judgment affirmed.*[2]

[1] The concurring opinions of SHEE, J., CROMPTON, J., and CHANNELL, B., and the dissenting opinions of POLLOCK, C. B., and BRAMWELL, B., are omitted. — ED.

[2] Lawder *v.* Lawder, Ir. R. 7 C. L. 57 (*semble*), *Accord.* — ED.

J. SOOY AND OTHERS *ads.* THE STATE OF NEW JERSEY.

IN THE SUPREME COURT, NEW JERSEY, FEBRUARY TERM, 1877.

[*Reported in* 39 *New Jersey Reports*, 135.]

BEASLEY, C. J.[1] The next plea to which the demurrer is addressed sets up, as a defence to the action, the non-communication on the part of the State of certain facts within its knowledge, touching the position and standing of the treasurer, and which it is alleged ought, in good faith, to have been disclosed to the sureties at or before the execution of the bond.

The allegations in the plea on this score are to this effect: that for a long time prior to the making and delivery of the bond, the said Josephus Sooy, Junior, had at various times embezzled and wasted divers sums of the money of the State which had been committed to his custody, and had applied them to his own use, and had therein been guilty of defalcation in his office, and that such misdeeds were known to the State.

There are other statements in the plea which will be considered in the sequel, the foregoing averments being separated from these with a view of considering the naked question whether the failure on the part of the State to disclose the circumstance stated will, *per se*, illegalize the bond.

Upon turning to the authorities it will be found that there has been some contrariety in judicial opinions touching this subject. That the obligee is bound, in morals and in law, to disclose to the surety, before he takes his guaranty, certain conditions of the transaction, does not appear to have been doubted; but the extent of such obligation has been the matter in disagreement. Lord Truro, in expressing his views in Owen *v.* Homan,[2] said: "I am not aware that either the text-books or the decisions distinctly define the extent of the obligation and responsibility which rest upon the creditor in regard to the surety being made acquainted with all the material circumstances connected with the transactions to which the suretyship is to be applied. The cases which are reported have generally arisen out of transactions in which there has been personal communication between the creditor and the surety; and the clear law deducible from these decisions is, that the creditor must make a full, fair, and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation. Lord Cranworth, while sitting as Lord Commissioner, well observed that applications for special injunctions are very much governed by the same principles which govern insurances, where the assured is bound to give to the underwriter all the information in his power, to enable him to estimate the character of the risk he is in-

[1] Only a portion of the opinion of the Court is given — ED.

[2] 3 Mac. & G. 378.

Plea that state knew of P's defalcations
at time of getting df to go surety. Wh were
not communicated
Held good defense

vited to undertake. I think the same principle is applicable to the case of sureties, and that when communication does take place between the creditor and surety, the duty of the creditor cannot better be illustrated than by the case of the assured." But this view of the Lord Chancellor has been entirely exploded. In the course of the argument in the case of the North British Insurance Co. *v.* Lloyd, Baron Parke says that the decision in Owen *v.* Homan was carried to the House of Lords, and the opinion above cited, of Lord Truro, was not acquiesced in; and in Hamilton *v.* Watson [1] the doctrine is still more distinctly rejected. In this last case Lord Campbell shows, to the point of demonstration, the impracticability of applying the rule of disclosure which obtains in favor of the underwriter, to the formation of suretyships.

But while it is thus settled that the principles of insurance and guaranty, in this respect, are not to be assimilated, and although the decisions have put the doctrine, so far as it regulates the relation of principal and surety, on the footing that fraud must exist to invalidate the obligation of the latter, nevertheless it seems to me that the facts set forth in this plea must be deemed a sufficient defence to this action. I justify this result by the assumption that if these facts thus stated are true, a fraud has been committed which will invalidate the bond sued on. The gravamen alleged in this plea is, that Mr. Sooy had antecedently been in the employment of the State as treasurer; and that during such term he had been guilty of defalcations and embezzlements which were known to the State; and that no disclosure of such malpractices had been made to the sureties, they being ignorant of them. Such a statement describes a fraud; at all events, a fraud in law. A person called in as a guarantor of the honesty of an employee has the right to infer that the continuance of such employee in the service of the master is a tacit assertion, on the part of the latter, that there has at least been nothing criminal in the past conduct of the servant in the course of his employment. Such an inference is the natural and reasonable result of the circumstances; and hence the obligee is chargeable with the knowledge that the surety is acting on that basis, and with such knowledge it is impossible to acquit him of bad faith if he allows the suretyship to take effect. Where silence is reasonably sure, in the ordinary course of things, to produce the effect of deceit, silence must be culpable; and in law the one should be regarded as the equivalent of the other. In the present instance the duty of disclosure was of the most imperative character; it is the case of an officer who had violated his official oath and defrauded the public, and had thus committed crimes of a nature highly penal. It was therefore obvious that, in becoming bound for the honest conduct of such an officer, the sureties were acting under a delusion as to the real facts of the transaction. Neither in morals nor in law can an obligee stand by and knowingly allow an obligor to take a risk which the former knows the latter has no intention to assume. Whatever else may be in doubt on this subject, it appears to me that

[1] 12 Cl. & Fin. 109.

the authorities have settled that, under such circumstances, not to disabuse the guarantor of the obvious mistake on which he is about to incur the obligation is *suppressio veri*, because good faith calls for the disclosure requisite to give to the contract the effect which the one party knows the other party expects it to have. The leading case upon this point is that of Smith *v.* The Governor and Company of the Bank of Scotland. . . .[1]

In my opinion, the law should be regarded as at rest upon this subject, to the extent that it is the duty of a person taking a guaranty for the good conduct of an employee to disclose the past malpractices of such employee in the course of the business to which the guaranty relates, and that if such duty is not performed, the instrument so taken is, *ipso facto*, invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect; and hence it must, under usual circumstances, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct.

The conclusion from this view is, that the facts set out in this plea, and which are admitted by the demurrer, are a legal defence to the present action.[2]

Argued at November Term, 1876, before BEASLEY, Chief Justice, and Justices SCUDDER, DIXON, and REED.

[1] The learned judge here discussed the cases, Smith *v.* Bank of Scotland, Railton *v.* Mathews, Phillips *v.* Foxall, and Franklin Bank *v.* Cooper. — ED.

[2] Guardian Co. *v.* Thompson, 68 Cal. 208; Anaheim Co. *v.* Parker, 101 Cal. 483 (*semble*); Wilson *v.* Monticello, 85 Ind. 10; Bank *v.* Anderson Co., 65 Iowa, 692; Bellevue Association *v.* Jeckel (Kentucky, 1898), 46 S. W. R. 482; Franklin Bank *v.* Moore, 39 Me. 542; 36 Me. 179; Traders' Co. *v.* Herber, 67 Minn. 106; Third Bank *v.* Owen, 101 Mo. 558; Harrison *v.* Lumbermen Co., 8 Mo. Ap. 37; Wells *v.* Walker (New Mexico, 1897), 50 Pac. R. 353; Howe Co. *v.* Farrington, 82 N. Y. 121 (*semble*); Ludekens *v.* Pscherhofer, 76 Hun, 548; U. S. Co. *v.* Salmon, 91 Hun, 535; Dinsmore *v.* Tidball, 34 Ohio St. 411; Smith *v.* Josselyn, 40 Ohio St. 409; Wayne *v.* Commercial Bank, 52 Pa. 343 (*semble*); Atlas Bank *v.* Brownell, 9 R. I. 168; Wilmington *v.* Ling, 18 S. Ca. 116; Screwmen *v.* Smith, 70 Tex. 168 (*semble*); Cashin *v.* Perth, 7 Grant, Ch. 340; East Zorra *v.* Douglas, 17 Grant, Ch. 462; Peers *v.* Oxford, 17 Grant, Ch. 472 (*semble*), *Accord.*

Roper *v.* Sangamon Lodge, 91 Ill. 518; Cawley *v.* People, 95 Ill. 249; Ætna Co. *v.* Mabbett, 18 Wis. 667, *Contra.*

Importance was attached, in the cases cited in the preceding paragraph, to the fact that the obligee did not procure the surety's signature, and was not present when he signed the obligation. See also, on this point, Magee *v.* Manhattan Co., 92 U. S. 93.

Non-disclosure after Inquiry by Surety. If a surety asks the creditor for information as to the subject-matter of the proposed suretyship, the creditor must, if he answers at all, make a full disclosure of everything within his knowledge that would naturally influence the decision of the surety to sign or not to sign the instrument. Bank *v.* Anderson Co., 65 Iowa, 692; Remington Co. *v.* Kezertee, 49 Wis. 409.

Sureties for Public Officers. The doctrine of the principal case has been held in a few cases, but for differing reasons, to be inapplicable in cases of suretyship for municipal or State officers. State *v.* Rushing, 17 Fla. 226; State *v.* Dunn, 11 La. An. 549; Frownfelter *v.* State, 66 Md. 80; Lawder *v.* Lawder, Ir. R. 7 C. L. 57; Byrne *v.* Munio, L. R. 8 Ir. 396. — ED.

H. BOSTWICK, RESPONDENT, *v.* S. L. VAN VOORHIS, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, FEBRUARY, 1883.

[*Reported in* 91 *New York Reports*, 353.]

EARL, J.[1] This action was brought by plaintiff, as receiver of the National Bank of Fishkill, against the defendant, as sole executor of Coert A. Van Voorhis, deceased, who was one of the sureties upon the official bond of Alexander Bartow, cashier of the bank.

Bartow was teller of the bank before he was appointed cashier thereof, and it is claimed that the directors, before his appointment as cashier, were aware of certain misconduct of his as teller, which they concealed from the sureties, and which they were bound, acting in good faith, to have made known to them. It is undoubtedly true that if the directors had knowledge that Bartow had been dishonest and unfaithful in his office as teller, they were bound to apprise the sureties of that fact, otherwise they could not hold them. But mere irregularities or omissions of duty on the part of Bartow while he was acting as teller, which did not affect his moral character or his official integrity and fidelity, even if known to the directors, would not enable the sureties to defend upon the ground that they had been deceived. Sureties are supposed to know the character of their principal, and to be willing to be bound for his fidelity. They must inquire and inform themselves of all the facts they desire to know, and if they omit to seek for or obtain the requisite information, they cannot easily avoid the bond upon inferential or unsatisfactory proof that they were drawn into signing it by bad faith on the part of the obligee. Before a bond in such a case can be avoided, the fraud and bad faith should be brought home to the obligee by quite clear and decisive evidence, otherwise bonds of this character will furnish a very precarious security to the parties who take them. In Tapley *v.* Martin[2] it was said: "The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the officers or agents of the bank, and such negligence does not discharge the sureties;" and it was held that the surety upon the bond of the cashier of a national bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them.[3] In Atlantic & Pacific Telegraph Co. *v.* Barnes[4] it was held that "the sureties upon a bond given by an em-

[1] Only a portion of the opinion of the Court is given. — ED.

[2] 116 Mass. 275.

[3] Anaheim Co. *v.* Parker, 101 Cal. 483; Tapley *v.* Martin, 116 Mass. 275; Bowne *v.* Mt. Holly Bank, 45 N. J. 360; Wayne *v.* Commercial Bank, 52 Pa. 343, *Accord.* — ED.

[4] 64 N. Y. 385.

ployee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming into his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal, known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employee." In Board of Supervisors v. Otis [1] it was held that "mere laches on the part of an obligee or creditor, or non-performance of some act which might prevent loss to a surety, will not, in the absence of some express covenant or condition, discharge the surety. To be available to him as a defence, the neglect must be some positive duty owing to him." In Atlas Bank v. Brownell,[2] an action on a cashier's bond, it was held, that to avoid a bond on the ground of fraud on the part of the bank, or its directors, there must be a fraudulent concealment of something material for the surety to know. A concealment which will avoid a guaranty must be a fraudulent one. If not fraudulent in fact or in law the defence is not made out; and in Story's Equity Jurisprudence (§ 204), it is said that "the concealment to make void a contract must amount to the suppression of facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent." It is perceived from these authorities that the law simply requires from the obligee to sureties upon a bond good faith. He must not intentionally mislead them by what he says or does, or omits to say or do, and bad faith only on his part, which has misled the surety to his damage, will enable the surety to defend against the bond.

In this case, the claim is that the cashier who preceded Bartow had for some years been a defaulter to the bank, and that Bartow, as teller, aided in concealing and covering up the defalcation for years. The answer to this is that it does not appear, and was not found by the referee, that in anything Bartow did in reference to the accounts and transactions of the former cashier he acted dishonestly or fraudulently, or that he knew the bank was to suffer any wrong or injury from the cashier's conduct. There was nothing in what Bartow did as a subordinate of the cashier, in reference to the cashier's accounts and transactions with the bank, showing that he was intentionally dishonest or unfaithful to the trust reposed in him by the bank; and such evidently was the view of the facts taken by the directors when, with full knowledge of all the facts, they appointed him cashier. Upon such facts it is quite clear that the sureties upon the bond are unable, within any authority that can be found, to void the bond on the ground of fraud.

Judgment affirmed.[3]

[1] 62 N. Y. 88. [2] 9 R. I. 168.

[3] Home Co. v. Holway, 55 Iowa, 571; Howe Co. v. Farrington, 82 N. Y. 121; Ludekens v. Pscherhofer, 76 Hun, 548 (*semble*); Screwman v. Smith, 70 Tex. 168; Peers v. Oxford, 17 Grant, Ch. 472, *Accord.*

Smith v. Josselyn, 40 Ohio St. 409, *Contra.* — ED.

Pastella had aided cashier to cover up defalcations, but not intentionally or dishonestly & when P was made cashier C did not disclose this misconduct to S who sets non-disclosure up as defense.

Held: J for Plf. Only duty on C is not to intentionally mislead.

POWERS DRY-GOODS CO. *v.* M. J. HARLIN AND OTHERS.

IN THE SUPREME COURT, MINNESOTA, MAY 10, 1897.

[*Reported in* 68 *Minnesota Reports*, 193.]

COLLINS, J.[1] After defendants Harlin Bros. had made an assignment for the benefit of their creditors, among whom was plaintiff, a corporation, a composition agreement was made and entered into between the debtors and each of their creditors upon a basis of 33⅓ per cent of the entire indebtedness. In accordance with this agreement, plaintiff accepted and received the debtors' promissory notes, with sureties.

Upon trial by the Court without a jury, the Court found that, before the composition agreement was signed by any of the creditors, plaintiff, as a condition to its signing the same, and without the knowledge of any of the other creditors of Harlin Bros., and without the knowledge of any of the parties who became sureties, demanded that Harlin Bros. give their written promise to pay plaintiff a larger percentage than was to be paid to the other creditors, and that pursuant to this demand, and before plaintiff signed the composition agreement, and as a condition to said signing, Harlin Bros. acceded to the demand, and thereupon executed and delivered to plaintiff three promissory notes for the balance due, 66⅔ per cent of plaintiff's entire claim, taking back from the plaintiff its written stipulation to discharge and surrender the note last mentioned upon payment of 25 per cent of the same.

The question in this case is, must this secret agreement between the plaintiff creditor and the defendant debtors be held to have discharged the sureties upon the notes given in accordance with the terms of the composition agreement? The answer to this question turns, we think, upon whether or not the composition agreement itself was rendered invalid by the execution of the secret agreement.[2]

The duty of a creditor to a surety is thus stated in Doughty *v.* Savage:[3] —

"It is a clear and well-settled principle that a security given by a surety is voidable on the ground of fraud if there is, with the knowledge or assent of the creditor, such a misrepresentation to or concealment from the surety of the transaction between the creditor and his debtor that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased."

A number of cases are cited in support of this doctrine. It has also been approved in this court recently, in Trader's *v.* Herber.[4] The

[1] Only a portion of the opinion of the Court is given. — ED.

[2] This question the Court answered in the affirmative. — ED.

[3] 68 Minn. 155.

[4] 67 Minn. 106.

remaining inquiry is, would knowledge of the existence of the secret agreement have been calculated to materially influence the sureties when determining whether they would enter into their contracts of suretyship on the composition notes? The object of that agreement was to release the debtors from a portion of their indebtedness, and the sureties entered into their contract for this purpose, induced so to do by the representations and belief that the debtors were to be freed and released from any further liability. In this they were deceived, and through the concealment of the plaintiff, payee of the notes, the object was not attained. By reason of the fraud it was within the power of the innocent creditors to ignore the composition, and recover the balance due upon their claims. The ability of the debtors to meet their notes, or to indemnify the sureties, was hazarded and impaired at once by the contingency. That the extent of the sureties' liability and the risk they had assumed were materially increased is obvious. The concealment was a fraud upon them, and exonerated them from their obligations. *Order affirmed.*[1]

[1] In Jungk *v.* Reed, 9 Utah, 49, and Jungk *v.* Holbrook (Utah, 1897), 49 Pac. R. 305, the surety for the performance of an undertaking by one firm in favor of another firm was exonerated by reason of the non-disclosure by the obligee firm that one X was a common member of both firms. — Ed.

Pltf and others were crs of P who entered into composition w/ crors pay 33⅓ op. Before any cr signed agreement, C demanded as ye price of his signature a large amt which was agreed to by Pr in writing. The crs were to accept P's notes w/ sureties in paym. of which is a surety on pltf, C's note & for Dft. The Concealm was fraud on Dft because by the agreem concealed P was not released from his debts to any of his crs & thereby the likelihood of paying the notes by wh S dft was surety was diminished.

SECTION XI.

Retention of Principal in Service after Knowledge of his Dishonesty.

PHILLIPS v. FOXALL.

IN THE QUEEN'S BENCH, JULY 6, 1872.

[*Reported in Law Reports, 7 Queen's Bench, 666.*]

THE judgment of COCKBURN, C. J., LUSH and QUAIN, JJ., was delivered by

QUAIN, J.[1] This is an action brought by the plaintiff on a contract whereby the defendant guaranteed the honesty of one John Smith, a servant in the employ of the plaintiff, to the extent of £50. The contract is set out in the declaration, and recites the employment of Smith, and that it was his duty to collect money for the plaintiff and account to her for all sums of money so collected; and that the plaintiff had before the giving of the guaranty held in her hands a sum of money belonging to Smith, as a security for the proper performance by Smith of his duty, which sum the plaintiff had agreed to pay back to Smith on receiving the defendant's guaranty. The declaration then proceeds to allege that in consideration that the plaintiff would pay over to Smith the money so held, and continue him in the service of the plaintiff in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss, not exceeding £50, which she might at any time sustain through any breach by Smith of his duty during the continuance of such service; and it alleges a breach, in the usual form, that Smith failed to pay over sums of money to the amount of £50, which he had collected on behalf of the plaintiff.

In answer to this declaration the defendant divides the time during which the service lasted, and during which the loss was sustained, into *two* periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; and, secondly, from the last-mentioned day to the 4th of April, 1871, when the service terminated. As to the first period, the defendant admits his liability for loss incurred by the acts of the servant during that period, and he has paid £10 into court, which he alleges is sufficient to reimburse the plaintiff for such loss. As to the second period, he pleads a plea on equitable grounds, which is to this effect: that the servant had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff had discovered on the latter day, and that the plaintiff then, without communicating

[1] Only the opinion delivered by QUAIN, J., is given. — ED.

such discovery to the defendant, and while the defendant was ignorant of the servant's dishonesty, agreed with the servant to continue him in her employ as before, and the servant on the other hand agreed to pay to the plaintiff £3 a month on account of the previous defalcations. The plea then alleges that the servant was continued in the plaintiff's service accordingly on these terms. The plea then goes on to state that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by the servant during the continuance of the service, as so agreed on, after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant of the previous defalcations of the servant; and that by reason of the plaintiff not having given the defendant notice of such defalcations he was prevented from revoking the guaranty.

To this plea the plaintiff has demurred, and the question argued before us was whether the plea afforded a good defence to so much of the cause of action as it was pleaded to; namely, the loss occasioned by the defalcations of the servant committed between the 20th of November and the end of the service.

We are of opinion that the plea is good.

We think that in the case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Suppose that the state of facts, which has arisen here in the course of the service, had existed before or at the time when the guaranty was given, — in other words, that the servant had previously committed defalcations in the plaintiff's service, and had agreed to repay them at the rate of £3 a month, — and that this fact had been concealed by the master from the defendant when he gave the guaranty, it cannot, we think, be doubted that a fraud would have been committed on the surety which would have relieved him from all liability on the contract. This we think is established by the judgments in the House of Lords in Smith *v.* Bank of Scotland, and in Railton *v.* Mathews. In the former case Lord Eldon says, "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent." In the latter case

Lord Cottenham cites with approbation the opinion of Lord Eldon in Smith *v.* Bank of Scotland; and Lord Campbell adds, "If the defenders had facts within their knowledge which it was material the sureties should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts — the undue concealment of those facts — discharges the surety."

We do not think that the principles of law as laid down in these cases have been materially altered by the decision of the House of Lords in the subsequent case of Hamilton *v.* Watson,[1] or by that of the Court of Exchequer in the North British Insurance Co. *v.* Lloyd. In the former case the principle above mentioned was not denied, but the question that arose was as to its application to the facts of that particular case; and Lord Campbell states that the criterion for the necessity of voluntarily disclosing any particular fact in cases of this kind may be, whether the fact not communicated was one that could "not naturally be expected to have taken place between the parties who are concerned in the transaction." In North British Insurance Co. *v.* Lloyd, the Court of Exchequer held that the rule as to the effect of concealment in marine insurance cases did not apply to contracts of suretyship, and that in the latter cases the concealment must be fraudulent in order to avoid the contract. In Lee *v.* Jones, the majority of the judges in the Exchequer Chamber held that a concealment by the creditor, that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount,—of which the surety was ignorant,—was evidence to go to the jury of such a fraud on the surety as would discharge him from liability. It must depend (as observed by Blackburn, J., in the case last cited) "upon the nature of the transaction in every case, whether the fact not disclosed is such that it is impliedly represented not to exist." We cannot doubt but that previous acts of dishonesty by the servant in the same service, known to the master, would be such a fact, and if concealed from the surety would avoid the contract. *Vide* Story's Equity Jurisprudence, vol. i. §§ 215 and 324.

If, therefore, it is correct, as we think it is on these authorities, to say that such a concealment as is here pleaded, if it had been practised at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guaranty a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety unless his assent has been obtained, after knowledge of the dishonesty, that his guaranty should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligations is, that it is only reasonable to suppose that such a fact, if known to him, must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner it seems to us equally reasonable to suppose that it never could have entered

[1] 12 Cl. & F. 109.

into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guaranty should continue to apply to his future conduct, when the master chose for his own purposes to continue the servant in his employ, without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination.

If the guaranty at its inception was founded, as suggested by Lord Eldon in Smith *v.* Bank of Scotland, on the trustworthiness of the servant, so far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master the whole foundation for the continuance of the contract, as regards the surety, fails; and it seems to us in accordance with the plainest principles of equity and fair dealing that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself stand the risk of loss arising from any future dishonesty. "It is the clearest and most evident equity" (says Lord Loughborough, in Rees *v.* Berrington [1]) "not to carry on any transaction without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." Thus, in the present case the conduct of the master in retaining the servant in his employ, when he might have discharged him for dishonesty, seems, in the words of Lord Loughborough, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged from further liability in cases of this kind will vary according to the circumstances of each case; but we intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service after he becomes aware of the dishonesty, and without the assent or knowledge of the surety.

No case directly in point, either in favor of this plea or against it, has been cited before us. In Peel *v.* Tatlock,[2] a question arose how far the concealment of the servant's embezzlement for three years after the termination of the service would affect the liability of the surety. No decision was, however, given on that point, and the case contains only a *dictum* of Eyre, C. J., that an industrious (by which we presume he meant an intentional or fraudulent) concealment might have an effect on the liability of the guarantor. In Smith *v.* Bank of Scotland [3] there is an observation of Lord Redesdale, made in the course of the argument,

[1] 2 Ves. 540, 543.
[2] 1 B. & P. 419, 423; and see p. 421.
[3] 1 Dow, at p. 287.

which has a closer bearing on the present question. In that case Paterson, the bank agent, seems to have given security to the bank, apparently at the commmencement of his service; afterwards, and while the service continued, and after his accounts had been inspected and reported on by an officer of the bank, he was called on to give additional security, and Smith, the appellant, gave a bond as such additional security. Smith raised an action of reduction of this bond, and in that action insisted on his right to inspect the above report of the officer of the bank. On this Lord Redesdale observed: "Supposing the report showed that Paterson was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions, as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties." The cases to which Lord Redesdale alludes are not mentioned, but it seems pretty clearly to have been his opinion that if the master discovers the dishonesty of his servant during the service, and afterwards continues to trust him notwithstanding, the surety for the servant would be discharged from all liability for subsequent losses. In the case of Shepherd *v.* Beecher,[1] before Lord Chancellor King, a father, on binding his son apprentice, gave a bond for his fidelity. Some years afterwards the apprentice embezzled £200 of the master's money, of which the master gave notice to the father, and demanded the money. The father paid the amount, but sent a letter requesting the master not to trust the apprentice with cash in the future, or at least to do so very sparingly. The apprentice continued afterwards with the master for several years, and committed further embezzlements, of which the father had no notice until two years after the expiration of the apprenticeship, when the bond was put in suit. The Lord Chancellor held that the father continued bound, stating apparently as the ground of his judgment "that the father ought not to have satisfied himself with sending the letter and taking no further care of the matter, but should have endeavored to make some end with the master, and to have got up the bond." This decision seems to us to rest on the fact that the father, instead of taking measures to have the bond delivered up, as he might have done, assented to continue bound after he had notice of the first embezzlement, and that the other embezzlements were not actually ascertained until after the expiration of the apprenticeship.

It is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his liability by a subsequent promise or assent. Mayhew *v.* Crickett;[2] Smith *v.* Winter.[3] In the present plea it is alleged as a conclusion of law that, by reason of the concealment, the defendant was prevented from revoking the guaranty and compelling Smith to pay the money for which

[1] 2 P. Wms. 288, 290. [2] 2 Swan. 185. [3] 4 M. & W. 454.

the defendant was liable. The discharge of the surety in the present case seems to us to arise rather out of the nature and equity of the contract between the parties than upon any assumed right of revocation. We think the surety is discharged unless he assents or agrees, after he has had knowledge of the dishonesty, that the guaranty shall hold good for the subsequent service; but, as a revocation of the guaranty as soon as the dishonesty has come to his knowledge will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation, or want of assent after notice of the dishonesty, seems rather a question of words than of substance.

In Parsons on Contracts, vol. ii. p. 31, the rule as to the right to revoke a guaranty like the present is thus stated: "If the guaranty be to indemnify for misconduct of an officer or servant, the promise is revocable, provided the circumstances are such that, when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." No judicial authority is cited in support of this proposition, and therefore it can only be cited as the opinion of the writer. It will be seen that he confines the right of the surety to revoke his guaranty to those cases where the master may, on the revocation being made, dismiss the servant without injury to himself. The present case is distinctly within the limitation, and there can be no doubt but that the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself *in statu quo*, is a most material ingredient in the consideration of the question.

Since the argument of this case, the judgment of Malins, V. C., in Burgess *v.* Eve,[1] has been published. The chief question in that case was whether the contract before the Court was or was not a continuing guaranty; but in the course of his judgment the Vice-Chancellor expresses an opinion which directly applies to the present case. "My opinion is" (he says), "and I have no hesitation in expressing it, that a person who gives a guaranty would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guaranty,' provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the persons giving that guaranty for him. If the employer under such circumstances refused to give the guaranty up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be cancelled." And the same opinion is repeated in other parts of his judgment. It may be said that this opinion was not necessary for the decision of the case before the Vice-Chancellor, and is not, therefore, a binding authority. That may be so, but the opinion seems to us to be founded on equity and good sense, and as such we adopt it as directly

[1] Law Rep. 13 Eq. 450, 458.

Phillips v Foxall

One Smith was employed by π's, to collect monies, Δ guaranteed to π any defaults by Smith. Smith defaulted to a certain extent, & after that period π still kept him in her employ, without notifying Δ, on contract that Smith would repay sum to π. Smith continuing defaulting, & amt = for total amt. Δ claimed that he was only liable for defaults up until knowledge by π of, at default.

Ct sustained Δ's contention. To continue employee longer in service is a concealment of a fact that ought to be revealed to surety, since it is very material, & also varies the risk. Hence S is discharged to the extent of future defaults after [illegible]

This follows doctrines in Concealment, i.e. There must be conscious failure to state facts.

applicable to the case now before us. For these reasons we think that the plea is good, and that the defendant is entitled to our judgment.[1]

[1] BLACKBURN, J., concurred, but upon somewhat different reasoning from that of the other judges. The following extract gives the gist of his opinion. "But there is a ground on which I think he may have a ground for being discharged in equity, which I will now state. A surety, as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against the debtor; and as a consequence, if the creditor has by any act of his deprived the surety of the benefit of any of those remedies, the surety is discharged. The authorities for this, as far as known to me, are collected in the judgment to Bailey *v.* Edwards, 4 B. & S. 770; 34 L. J. (Q. B.) 41; and this equitable principle has, at least in the case where time has been given to the principal without the consent of the surety, been adopted to some extent at least, although whether to its full extent has been doubted. See Pooley *v.* Harradine, 7 E. & B. 431; 26 L. J. (Q. B.) 156. But it is not now material to decide that. Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for the surety's protection, it seems to follow that, by waiving the forfeiture and continuing the employment without consulting the surety, the principal has discharged him."

The doctrine of the principal case obtains generally. Saint *v.* Wheeler, 95 Ala. 362; Roberts *v.* Donovan, 70 Cal. 108; Rapp *v.* Phœnix Co., 113 Ill. 390; Donnell Co. *v.* Jones, 66 Ill. Ap. 327 (*semble*); La Rose *v.* Logansport Bank, 102 Ind. 332 (*semble*); Commercial Co. *v.* Scott, 81 Ky. 540; Lake *v.* Thomas, 84 Md. 608 (*semble*); Colby Co. *v.* Coon (Michigan, 1898), 74 N. W. R. 519; Newark *v.* Stout, 52 N. J. 35 (*semble*); Enright *v.* Falvey, L. R. 4 Ir. 397 (but rule not applicable unless the creditor has the power of removing the principal obligor: Lawder *v.* Lawder, Ir. R. 7 C. L. 57; Byrne *v.* Muzio, L. R. 8 Ir. 396); Corporation *v.* McElroy, 9 Ont. 580.

But see, *contra*, Taylor *v.* Bank of Kentucky, 2 J. J. Marsh. 564; Pittsburg Co. *v.* Shaeffer, 59 Pa. 350; Bank *v.* Tumbler Co., 172 Pa. 609, 626 (*semble*).

Reprehensible Ignorance of Principal's Dishonesty. If the dishonesty of the principal is not known to the obligee, the surety continues liable for subsequent defaults of the principal. He cannot exonerate himself by showing gross neglect on the part of the obligee in not discovering the dishonesty of the principal. Frelinghuysen *v.* Baldwin, 16 Fed. R. 452; Phillips *v.* Bossard, 35 Fed. R. 99; Planters' Bank *v.* Lamkin, R. M. Charlt. 29; Colby Co. *v.* Coon (Michigan, 1898), 74 N. W. R. 519; Newark *v.* Stout, 52 N. J. 35; Atlas Bank *v.* Brownell, 9 R. I. 168; Enright *v.* Falvey, L. R. 4 Ir. 397.

Immorality Independent of Suretyship Transaction. Retention by the obligee of the principal after knowledge of his immorality in matters foreign to the subject-matter of the suretyship does not release the surety. La Rose *v.* Logansport Bank, 102 Ind. 332. — ED.

WATERTOWN FIRE INSURANCE CO. *v.* G. W. SIMMONS AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, APRIL 6, 1881.

[*Reported in* 131 *Massachusetts Reports*, 85.]

MORTON, J. This is an action against the defendants as sureties upon a bond given by George L. Dix, conditioned for the faithful performance of his duties as agent of the plaintiff, "according to the by-laws, rules, and regulations of said company."

One of the by-laws of the company required that the agents should render monthly accounts, and should pay each month the balance due to the company. It appeared that Dix rendered his monthly accounts regularly, but that in December, 1877, he failed to pay the whole balance due by him; and that thereafter his indebtedness to the company increased from month to month until his death in March, 1879, when he owed a balance larger than the penal sum of the bond. The plaintiff did not notify the sureties of his default until after his death. The defendants contend that they were discharged from their liability as sureties by these facts.

It is too well settled to be questioned, that the delay of the plaintiff to collect the monthly payments due by Dix would not of itself discharge the sureties. Mere delay by the creditor to proceed against the debtor, unaccompanied by fraud or an agreement to give time, does not discharge the sureties. Hunt *v.* Bridgham.[1] The defendants contend that the by-law, being referred to in the bond, "amounts to a contract between the plaintiff and the sureties that the plaintiff will not knowingly permit the agent to depart from the duty there recited." The sole object of the bond was to secure the performance by Dix of his duties under the by-laws, and they are referred to only for the purpose of defining these duties. They cannot be construed as importing a stipulation with the sureties that the plaintiff shall cause them to be observed and kept, under the penalty of discharging the sureties. Such by-laws are directory merely, and a failure to observe them by the plaintiff or its managing officers will not discharge the sureties. Amherst Bank *v.* Root;[2] Locke *v.* United States.[3]

But the principal ground of defence is that it was the duty of the plaintiff, within a reasonable time, to notify the sureties of any default of the agent, and that the failure to do so was laches which discharged them. It may be questioned whether, if there was negligence of the other officers or agents amounting to laches, the corporation would be affected by it, as the object of the bond was to give the stockholders the double security of the supervision of its officers and the obligation of the sureties. Amherst Bank *v.* Root, *ubi supra*. But treating this

[1] 2 Pick. 581. [2] 2 Met. 522. [3] 3 Mason, 446.

case as if it were the case of an individual obligee, we are of opinion that there is no rule of law which makes it a duty which the creditor, under the circumstances of this case, owes to the surety, either to dismiss its agent or to notify the surety of his default. If a creditor does any act which injuriously affects the situation and rights of the surety, such as giving time to the debtor, or relinquishing security which he holds for the debt, he discharges the surety either in whole or *pro tanto*. But the creditor owes no duty of active diligence to take care of the interest of the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor. Wright *v.* Simpson;[1] Adams Bank *v.* Anthony;[2] Taft *v.* Gifford;[3] Tapley *v.* Martin.[4] The surety is bound to inquire for himself; and cannot complain that the creditor does not notify him of the state of the accounts between him and his agent, for whom the surety is liable. Mere inaction of the creditor will not discharge the surety unless it amounts to fraud or concealment.

The defendants rely upon the cases of Phillips *v.* Foxall, Enright *v.* Falvey,[5] and Sanderson *v.* Aston. In the first two cases it was held that, in the case of a continuing guaranty for the honesty of a servant, if the master discovers acts of dishonesty in the servant and afterwards continues him in his service without notice to the sureties, the latter are discharged. We have no occasion to discuss these cases further than to say that they have no application to the case before us, because it is not contended that the agent Dix, for whom the defendants were bound, was guilty of any defalcations or other dishonest or fraudulent conduct. In Sanderson *v.* Aston, the declaration was on a bond guaranteeing that one J., a clerk of the plaintiff, should pay over all money he received on the plaintiff's account; the plea was, that, before the defaults sued for, J. had committed other defaults of the same kind, and the plaintiff, knowing this, continued to employ him without notice to the defendant. On demurrer, this plea was held good. Chief Baron Kelly, in delivering his opinion, says, "The case of Phillips *v.* Foxall clearly shows that, if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him." This decision does not seem to be sustained by Phillips *v.* Foxall, which was a case of criminal embezzlement by the servant, and we are not aware of any other decisions sustaining it, at least in this country. Its effect would be to impose upon the creditors the duty of notifying the sureties whenever there are any arrears in the accounts of the agent or servant for whom they were bound, from whatever cause arising. We do not think that any such active duty of diligence to protect the sureties grows out of the relations of the parties, and are

[1] 6 Ves. 714. [2] 18 Pick. 238. [3] 13 Met. 187.
[4] 116 Mass. 275. [5] 4 L. R. Ir. 397.

not able to agree with the decision in Sanderson *v.* Aston, regarding it as in conflict with the general current of authorities.

This question was considered in Atlantic & Pacific Telegraph Co. *v.* Barnes,[1] and it was held that continuing an agent in service after a default is known, without notice to the surety, does not discharge him, no fraud or dishonesty being shown. See also McKecknie *v.* Ward.[2]

Upon the whole case, therefore, we are of opinion that, upon the facts as stated in the bill of exceptions, the sureties were not discharged; and that the Superior Court rightly found for the plaintiff.

Exceptions overruled.[3]

[1] 64 N. Y. 385. [2] 58 N. Y. 541.

[3] Wilkerson *v.* Crescent Co., 64 Ark. 80; Charlotte Co. *v.* Gow, 59 Ga. 685; Home Co. *v.* Holway, 55 Iowa, 571; Phœnix Co. *v.* Findley, 59 Iowa, 591; Ætna Co. *v.* Fowler, 108 Mich. 557; Lancashire Co. *v.* Callahan, 68 Minn. 277; Manchester Co. *v.* Redfield (Minnesota, 1897), 71 N. W. R. 709; Atlantic Co. *v.* Barnes, 64 N. Y. 385; Wilmington Co. *v.* Ling, 18 S. Ca. 116; Richmond Co. *v.* Kasey, 30 Grat. 218, *Accord.*

Knowledge of misconduct outside of subject-matter of the suretyship need not be communicated. La Rose *v.* Logansport Bank, 102 Ind. 332. — Ed.

Watertown Ins Co v Simmons.

P employed one Dix, + D's were sureties on bond for his faithful performance according to by laws of Co, One of these was that agts should render monthly accounts. In Dec 1877, Dix failed to pay full balance, + came for subsequent months until his death. P never notified D's of this until death. D's contend they were discharged.

Ct gave judgment for P. Delay in order that would not discharge D's for then object was only to secure performance by servant, + were sureties merely. Failure does part of no notice or breach release S. Creditor owes no active duty to the surety, surely must see at his peril that P performs. Ct seemed to intimate that unless there was insolvency, surety would not be discharged.

Notice that reason for default in monthly payments does not appear. It would seem that unless default increases risk, or vary ct. S is not discharged, i.e. it cant be every little breach of duty which discharges S.

SECTION XII.

Fraud or other Misconduct of Principal towards Surety.

ALBERT L. WARD *v.* SAMUEL HACKETT AND OTHERS.

IN THE SUPREME COURT, MINNESOTA, JANUARY 10, 1883.

[*Reported in* 30 *Minnesota Reports*, 150.]

MITCHELL, J.[1] Defendant Elwis signed a negotiable promissory note as surety for defendant Hackett, and delivered it to Hackett, upon condition that he should not deliver it to plaintiff, the payee, until he procured the signature of one Johnson as co-surety. Hackett failed to get Johnson's signature, but, without the knowledge or consent of Elwis, got defendant Rice to sign it, and then delivered it to plaintiff, who took it in the ordinary course of business for a valuable consideration, without any notice of the facts hereinbefore stated and now set up by way of defence. Elwis now claims that he is not liable, *first*, because the note was delivered without Johnson's signature, contrary to the condition upon which he signed it and left it with Hackett; *second*, that the addition of the name of Rice to the note, without his knowledge or consent, amounted to a material alteration of the instrument, which discharged him. These two questions we will consider in the order named.

1. The form of the note, when Elwis signed it and gave it to Hackett, was such that it was apparently complete. There was nothing on the face of the paper indicating that any other co-surety was expected to become a party to the instrument, and no fact was brought to the knowledge of the plaintiff, before he accepted the note, calculated to put him on his guard, or which should have induced inquiry. Elwis by his acts clothed Hackett with apparent authority to launch the note as it then was. The surety having thus placed the instrument, perfect on its face, in the hands of the proper person to pass it to the payee, the law justly holds that, as against the payee who takes it in good faith, for value, without any notice of this condition, the apparent authority with which the surety has clothed his principal shall be regarded as the real authority, and in such case the condition shall not avail the surety. This is too well settled to require discussion.[2] Brandt on Suretyship, § 354, and cases cited.

2. The second point is more important. It has been very fully and

[1] Only the opinion of the Court is given. — ED.

[2] Dair *v.* United States, 16 Wall. 1; Butler *v.* United States, 21 Wall. 272; State *v.* Churchill, 48 Ark. 426; Tidball *v.* Halley, 48 Cal. 610; Byers *v.* Gilmore (Colorado, 1897), 50 Pac. R. 370; Bonner *v.* Nelson, 57 Ga. 433; Clark *v.* Bryce, 64 Ga. 486; Mathis *v.* Morgan, 72 Ga. 517 (but see Crawford *v.* Foster, 6 Ga. 202; Cleghorn *v.* Robison, 8 Ga. 559; and Riley *v.* Johnson, 10 Ga. 414); Comstock *v.* Gage, 91 Ill. 328;

ably argued by appellant, but, unfortunately for us, the respondent has not deemed it necessary to discuss the question at any considerable length. The position of appellant is that the fact of Hackett's obtaining the name of another surety upon the note without his knowledge or consent, although done before the note was delivered to plaintiff,

Rhode v. McLean, 101 Ill. 467; Deardorff v. Foresman, 24 Ind. 481; Webb v. Baird, 27 Ind. 368; State v. Pepper, 31 Ind. 76 (overruling s. c. 22 Ind. 399); Hunt v. State, 53 Ind. 323; Mowbray v. State, 88 Ind. 324; Carroll Co. v. Ruggles, 69 Iowa, 269; Micklewait v. Noel, 69 Iowa, 344; Benton Bank v. Boddicker (Iowa, 1898), 75 N. W. R. 632; Smith v. Moberly, 10 B. Mon. 266; Millett v. Parker, 2 Met. (Ky.) 608; Jackson v. Cooper (Kentucky, 1897), 39 S. W. R. 39; York Co. v. Brooks, 51 Me. 506; State v. Peck, 53 Me. 284; Lewiston v. Gagne, 89 Me. 395; Thomas v. Bleakie, 136 Mass. 568, 571; McCormick v. Bay City, 23 Mich. 457; Gibbs v. Johnson, 63 Mich. 671; Crystal Lake Tp. v. Hill, 109 Mich. 246; First Bank v. Compo-Board Co., 61 Minn. 274; Mo. Bank v. Phillips, 17 Mo. 29; State v. Potter, 63 Mo. 212 (explaining earlier Missouri cases); State v. Modrel, 69 Mo. 152; Wolff v. Schaeffer, 74 Mo. 154; North Atchison Bank v. Gay, 114 Mo. 203; Cutler v. Roberts, 7 Neb. 4; Owen v. Udall, 39 Neb. 14; Brumback v. German Bank, 46 Neb. 540; Merriam v. Rockwood, 47 N. H. 81; Ordinary v. Thatcher, 41 N. J. 403 (*semble*); Russell v. Freer, 56 N. Y. 67; Singer Co. v. Drummond, 40 Hun, 260; Bangs v. Bangs, 41 Hun, 41 (People v. Bostwick, 32 N. Y. 445, *contra*, is virtually overruled; Grimwood v. Wilson, 31 Hun, 215, is distinguishable); Gwyn v. Patterson, 72 N. Ca. 189; Vass v. Riddick, 89 N. Ca. 6, 8; Xander v. Commonwealth, 102 Pa. 434; Whitaker v. Richards, 134 Pa. 191; Jordan v. Jordan, 10 Lea, 124; Dun v. Garrett, 93 Tenn. 650; Davis v. Gray, 61 Tex. 506; Ballou v. Wichita Co., 74 Tex. 339; McFarlane v. Howell (Texas Civil Appeals, 1897), 43 S. W. R. 315; Carleton v. Cowart (Texas Civil Appeals, 1898), 45 S. W. R. 749 (*semble*); Passumpsic Bank v. Goss, 31 Vt. 315; Dixon v. Dixon, 31 Vt. 450; Probate Court v. St. Clair, 52 Vt. 24; Nash v. Fugate, 24 Grat. 202, 32 Grat. 595; Lyttle v. Cozad, 21 W. Va. 183; Belden v. Hurlbut, 94 Wis. 562 (commenting on earlier Wisconsin cases); Corporation v. Armstrong, 27 Up. Can. Q. B. 553, *Accord*.

Bibb v. Reid, 3 Ala. 88 (bond); Robertson v. Coker, 11 Ala. 466 (bond); Guild v. Thomas, 54 Ala. 414 (bond); King v. State, 81 Ala. 92 (bond); Smith v. Kirkland, 81 Ala. 345 (bond); Evans v. Daughtry, 84 Ala. 68 (bond); Sharp v. Allgood, 100 Ala. 183 (bond), (citing earlier Alabama cases); Sessions v. Jones, 7 Miss. 123 (bond) (but see Graves v. Tucker, 18 Miss. 9 (bond); State v. Allen, 69 Miss. 508, bond), *Contra*.

Absence of Signature of one named as Co-surety in Body of Instrument. If, however, a surety signs an obligation, and delivers it to the principal on condition that it shall not be given to the obligee until another person, whose name appears in the body of the instrument, also signs it, he will not be liable unless that other person also signs; for the obligee, being apprised by the form of the instrument that all persons named were contemplated as parties, is treated as having constructive notice of the conditional delivery. Pawling v. United States, 4 Cranch, 219; Duncan v. United States, 7 Pet. 435; Sharp v. Algood, 100 Ala. 183; State v. Churchill, 48 Ark. 426; Allen v. Marney, 65 Ind. 398; Markland Co. v. Kimmel, 87 Ind. 560; Johnson v. Weatherwax, 9 Kas. 75 (*semble*); Hall v. Smith, 14 Bush, 604 (but see Jones v. Shelbyville Co., 1 Met. Ky. 58); Readfield v. Shaver, 50 Me. 36 (*semble*); Thomas v. Bleakie, 136 Mass. 568, 571 (*semble*); Hessell v. Johnson, 63 Mich. 623; State Bank v. Evans, 15 N. J. 155; Ordinary v. Thatcher, 41 N. J. 403; State v. Lewis, 73 N. Ca. 138 (*semble*); Fertig v. Bucher, 3 Barr, 308; Whitaker v. Richards, 134 Pa. 191 (*semble*); Fletcher v. Austin, 11 Vt. 447; Ward v. Churn, 18 Grat. 801.

But the absence of the signature of one named as surety creates no presumption that there was in fact a conditional delivery by the surety who signed. The latter must adduce satisfactory evidence of such a delivery. City v. Mellus, 59 Cal. 444; Towns v. Kellett, 11 Ga. 286; Johnson v. Weatherwax, 9 Kas. 75; Readfield v. Shaver, 50 Me. 36; State v. Moore, 46 Mo. 377; Gay v. Murphy, 134 Mo. 98, 106 (*semble*); Mullen v. Morris, 43 Neb. 596; Blume v. Bowman, 2 Ired. 338; Williams v. Springs, 7 Ired. 384

amounted to a material alteration of the instrument, which discharged him, even although plaintiff had no notice of the facts when he took the note. If this be the law, we are satisfied its announcement would be a surprise to the business and commercial world. It would render com-

(*semble*); Grim v. School, 51 Pa. 219 (explaining Sharp v. United States, 4 Watts, 21); Loew v. Stocker, 68 Pa. 226; Whitaker v. Richards, 134 Pa. 191; Ward v. Churn, 18 Grat. 801.

But see *contra*, Wells v. Dill, 1 Mart. N. S. 592.

In a few jurisdictions the form of the instrument, coupled with proof of the conditional delivery, is not enough to exonerate the surety in such cases. The surety must go so far as to show that the obligee had actual knowledge of the conditional delivery. Byers v. Gilmore (Colorado, 1897), 50 Pac. R. 370 (*semble*); Smith v. Board, 59 Ill. 412; Hart v. Mead Co. (Nebraska, 1897), 73 N. W. R. 458 (compare, however, Cutler v. Roberts, 7 Neb. 4; Mullen v. Morris, 43 Neb. 596).

Absence of Signature of Principal. There is, on the other hand, a presumption that a surety who signs does not mean to be bound unless the principal also executes the instrument. Accordingly, in the absence of the principal's signature, an obligee, who would charge the surety, must show that the surety in the particular case dispensed with the signature of the principal. Weir v. Mead, 101 Cal. 125 (because obligation was joint); Wild Cat Branch v. Ball, 45 Ind. 213 (*semble*); Clements v. Cassilly, 4 La. An. 380; Bean v. Parker, 17 Mass. 591; Wood v. Washburn, 2 Pick. 24; Goodyear Co. v. Bacon, 151 Mass. 460; Dole Co. v. Cosmopolitan Co., 167 Mass. 481; Johnston v. Kimball, 39 Mich. 187; Hall v. Parker, 39 Mich. 287, 37 Mich. 590; *Re* Cahill, 63 Mich. 616 (*semble*); State v. Austin, 35 Minn. 51; Martin v. Hornsby, 55 Minn. 187; Safranski v. St. Paul Co. (Minnesota, 1898), 75 N. W. R. 17; Bunn v. Jetmore, 70 Mo. 228; Gay v. Murphy, 134 Mo. 98; Board v. Sweeney, 1 S. Dak. 642.

In some jurisdictions, however, there is no such presumption, and the surety must show that his signing and delivery were, in fact, conditional upon the execution of the instrument by the principal. Cooper v. Evans, 4 Eq. 45; Kurtz v. Forqueer, 94 Cal. 91 (because obligation was joint and several); Hickman v. Fargo, 1 Kas. Ap. 695; Deering v. Moore, 86 Me. 181; Bollman v. Pasewalk, 22 Neb. 761; Parker v. Bradley, 2 Hill, 584; Chouteau v. Suydam, 21 N. Y. 179; Dillon v. Anderson, 43 N. Y. 231; Russell v. Freer, 56 N. Y. 67; Whitford v. Laidler, 94 N. Y. 145; Williams v. Marshall, 42 Barb. 524; O'Hanlon v. Scott, 89 Hun, 44; Eureka Co. v. Long, 11 Wash. 161; Douglas Co. v. Bardon, 79 Wis. 641.

In Illinois and Montana, and perhaps in Ohio, the surety, to escape liability, must show not only a signing and delivery conditional upon the execution of the instrument by the principal, but also that the obligee had notice of the conditional delivery. Trustees v. Sheik, 119 Ill. 579; Woodman v. Calkins, 13 Mont. 363; Cockrill v. Davis, 14 Mont. 131; State v. Bowman, 10 Ohio, 445; Johnson v. Johnson, 31 Ohio St. 131.

DELIVERY BY PRINCIPAL IN VIOLATION OF OTHER CONDITIONS. Just as the principal's failure to procure the promised signature of another party will not exonerate the surety, so an agreement between the surety and the principal that the surety's obligation shall not be delivered to the obligee except for a special purpose, or until the happening of some event, will not defeat an innocent obligee. Gage v. Sharp, 24 Iowa, 15: Carter v. Moulton, 51 Kas. 9; Thomas v. Bleakie, 136 Mass. 568; Small v. Smith, 1 Den. 583; Fowler v. Allen, 32 S. Ca. 229; Merritt v. Duncan, 7 Heisk. 156; Bowman v. Van Kuren, 29 Wis. 209; Moulton v. Posten, 52 Wis. 169 (*semble*); Cross v. Currie, 5 Ont. Ap. 31.

MISDELIVERY BY A STRANGER TO THE OBLIGATION. If a stranger to the obligation, to whom the surety has intrusted it to be delivered only in a certain contingency, delivers it in violation of his trust, the surety is nevertheless chargeable by a *bona fide* obligee or holder. Taylor Co. v. King, 73 Iowa, 153 (questioning Daniels v. Gower, 54 Iowa, 319, which was treated as overruled in Benton Bank v. Boddicker (Iowa, 1898), 75 N. W. R. 632); McCormick v. McKee, 51 Mich. 426.

But see *contra*, Millett v. Parker, 2 Met. (Ky.) 608 (*semble*); Nash v. Fugate, 24 Grat. 202 (*semble*). — ED.

mercial paper a very uncertain and unsafe subject with which to deal. But we have carefully examined all of the numerous cases cited by appellant, and do not find one that goes far enough to sustain him. Many of these cases hold that a material alteration of a note made by one of the promisors before its delivery, without the knowledge of the other promisor, makes the note void as against such other promisor, although the payee have no notice of the alteration when he takes the note. Such is doubtless the law. But, upon examination, these will all be found to be cases where the body of the note or the contract itself was changed, as by alteration of the date, rate of interest, or amount of the note. And the reason given why, in such cases, the party is discharged, is the self-evident one that the contract is no longer the one he made. Numerous cases are also cited to the effect that the addition of a new party to a note, without the consent of the other parties, is a material alteration of the instrument. But these will be found to be cases where the new name was obtained after the note was fully issued and delivered to the payee, and at his instance or with his knowledge. We have been referred to no case, and have found none, going so far as to hold, where a surety signs a promissory note and intrusts it to his principal, and the principal, while the instrument is still inchoate and has not become effectual as a contract by delivery, procures an additional signer, that this would be a material alteration and release the first surety. Two of the cases cited might, at first sight, seem to favor such a doctrine, but, upon examination, will be found not to sustain it, even if the payee knew, when he took the note, the circumstances under which the additional signature was obtained.

The case of Haskell *v.* Champion[1] was one where, at the instance of the payee, the names of new principal obligors were substituted in place of the original one, by changing the individual signature of one partner into the firm signature, thus attempting to make a party surety for persons for whom he had never agreed to be responsible.

The case of Hall *v.* McHenry[2] contains *dicta* by some of the judges which go farther than any decision we have found. In that case the name of the additional surety was obtained before delivery of the note, but at the instance and for the benefit of the payee. After the note was delivered, the payee cut off the name of this additional surety without the knowledge or consent of the first surety. Wright, J., who delivered the opinion of the Court, while admitting that he had found no authority to that effect, argues that thus adding a new surety, even before delivery of the note, would amount to a material alteration of the instrument, which would discharge the original surety, *provided the payee knew, when he took the note, of the circumstances under which the additional name was added.* He then states that the Court was not agreed on this proposition, and then proceeds to decide the case upon another point, to wit, that cutting the additional name off the note was a material alteration, which discharged the original surety.

[1] 30 Mo. 136. [2] 19 Iowa, 521.

Hackett et al v. Lee & Elvis

Elvis signed note as S for Hackett, on express condition that he would also get Johnson to sign. Johnson did not sign & Hackett got Lee to sign, not telling any one. Π sues B. & L., & tries to hold both sureties

[illegible] that if it was [illegible] will not [illegible] signing.

This is no alteration here, because it must be taken that Hackett is to have implied authority to get more signers, especially because this is a negotiable instrument & purchasers cant be compelled to investigate every maker.

Stone v Wickliffe

Note made by Thos Lee, P principal to raise money on discount from Π's. Thos applied to Δ to go surety, who refused, unless John Lee also went & ~~[illegible]~~ Thos came back next day, with forged signature of John, & Δ signed, unsuspectingly. Π tries to hold Δ.

[illegible] Δ had his chance to be satisfied of genuineness of note when he signed. Π was in no fault, & was under no duty of care to see that J's & not Δ signed. Hence there is no equity against Π's.

The rule that a material alteration of a contract avoids it had its origin largely in the necessity of preserving and protecting the integrity and sanctity of contracts. Properly applied, the rule is a salutary one. But the general sentiment of courts now is that the doctrine had been extended quite far enough, and that formerly, especially in England, it had been carried too far, and applied to cases not within the mischief intended to be prevented. Therefore, the tendency now is, if not to restrict, at least not to extend it beyond what has been already decided. To hold that the obtaining of an additional surety to a note, under the facts of the case at bar, amounted to an alteration of the instrument that would discharge Elwis, would in our judgment be harsh, technical, and work injustice, and establish a doctrine contrary to the general understanding of business men, which ought to be the law of such cases, and is the only just basis of the implied contract resulting from the facts. In dealing with commercial paper, complete on its face, and signed by several parties, we apprehend it never occurs to a business man that it is incumbent upon him to inquire of each maker whether he understood when he signed the paper just what other parties were to sign with him, or whether any additional names have been subsequently added without his knowledge or consent. To require any such thing would be inconvenient, without reason, and an innovation upon business usages. The idea that when a person signs a note as surety, and delivers it to his principal, no other surety is to be obtained, and, if the note cannot be negotiated in that form it cannot be used at all, unless all parties consent to the introduction of a new surety, is, we apprehend, contrary to the general understanding of the commercial world.

It seems to us that, at least as against an innocent holder, the principal obligor, to whom the paper has been intrusted by the surety, has implied authority to obtain additional sureties, until the note is launched into the market by delivery to the payee; and, as already remarked, this common understanding is the only just basis of an implied contract resulting from the facts. Courts have, in some cases, gone so far in holding that the addition of a new name to a note, under certain circumstances, amounted to a material and unauthorized alteration of the instrument, that it may be difficult to state the principle which distinguishes some of these cases from the present, nor do we feel compelled to attempt to do so. But whether or not the reason we have suggested be the correct one, we are satisfied that neither upon principle nor authority did the obtaining of Rice as additional surety amount, under the facts of this case, to an alteration of the instrument such as to release Elwis.[1] As Rice's claim to be discharged is entirely predicated upon the assumption that Elwis was released, it is unnecessary to consider it further. *Order affirmed.*

[1] Hall v. McHenry, 19 Iowa, 521 (*semble*); Graham v. Rush, 73 Iowa, 451; Babcock v. Murray, 58 Minn. 385; Keith v. Goodwin, 31 Vt. 268 (*semble*), *Accord.*
Stoner v. Keith Co., 48 Neb. 279, *Contra.*
See Governor v. Lagow, 43 Ill. 134; Sampson v. Barnard, 98 Mass. 359. — Ed.

THOMAS J. STONER v. JAMES MILLIKIN and Others.

In the Supreme Court, Illinois, January Term, 1877.

[*Reported in* 85 *Illinois Reports*, 218.]

Mr. Chief Justice Sheldon delivered the opinion of the Court.[1]

At the February term, 1874, of the County Court of Macon County, a judgment was entered by confession, in favor of Millikin & Co., against Thomas Lee, John Lee, and Andrew J. Stoner, for $453.33, upon a promissory note with a warrant of attorney attached, purporting to be executed by the three latter, dated the 24th day of June, 1873, payable ninety days after date to H. Crea, and assigned by him without recourse.

An execution, issued upon the judgment, was levied upon personal property of John Lee, sufficient in value to satisfy it. Afterward, by direction of Millikin & Co., the sheriff released the property of John Lee from the levy, and levied the execution upon certain real estate of Stoner, and the bill in this case was filed by Stoner to enjoin the sale of his property under the execution.

The Court below, upon final hearing on proof, dismissed the bill, and the complainant appealed.

The chief ground relied upon in support of the bill is, that the signature of the name of John Lee to the note is a forgery. The note is a joint and several one, the signature of Stoner being last upon the note. He testifies that Thomas Lee applied to him to sign the note as his security; that he refused to do so unless Lee would first get his brother, John Lee, to sign the note; that Lee went away saying he would go and get John to sign it; that the next day he came back, saying that he had got John to sign it, and presented the note with the signature of John Lee appearing to it, and witness then signed it, supposing the signature of John Lee to be genuine, knowing him to be responsible, and had he not supposed the note to have been signed by John Lee, he would not have executed it. Thomas Lee had made the arrangement beforehand with Millikin & Co. to lend him the money. H. Crea, the payee of the note, was but nominally such, Millikin & Co. being the real payees; and on presentment of the note, with Crea's indorsement on it, by Thomas Lee to Millikin & Co., who were bankers, they discounted the note, paying the proceeds to Thomas Lee.

Why should this forgery operate in discharge of Stoner, and entitle him to have his property exempted from sale on the execution?

It may have been a wrong toward him, and have caused him to incur a greater extent of liability than he expected; and the supposed obtaining of the execution of the note by John Lee may have been the sole condition upon which he signed his name to the note. Yet, on satisfactory evidence to himself, in that respect, he did place his name unconditionally to the note as a maker thereof, and left it with Thomas

[1] The case is slightly abridged. — Ed.

Lee to deliver to Millikin & Co., knowing that on the faith of his, Stoner's, promise to repay it, they would part with their money to Thomas Lee. There is no just reason why this promise to Millikin & Co. should not be kept.

Whatever of wrong there was to Stoner, was perpetrated by his co-maker, Thomas Lee. Millikin & Co. were wholly innocent in the matter; they had no notice of anything which had been transpiring among the makers of the note, as between themselves. Nor was it incumbent upon Millikin & Co. to exercise care over the interest of the surety in the note, look to the inducement which led him to become such, and see that it should not fail. They had but to watch over their own interest, and see that the security offered was a sufficient protection for them. For the lack of the vigilance they failed to exercise in this respect, they suffer the full consequence in the loss of the security of the name of John Lee. Whatever of fraud and deception the co-makers of the note practised toward one another, was their own sole concern, and the consequence, so far as may affect them in their relation to each other, should be borne by themselves alone. There is no justice in requiring Millikin & Co. to assume the risk of such conduct, and no sound principle upon which they should be made to suffer loss because of it, not being privy thereto.

York County M. F. Ins. Co. *v.* Brooks[1] and Selser *v.* Brock[2] are direct authorities to the point that such a forgery of the name of a prior surety will not discharge a subsequent surety. See Young *et al. v.* Ward.[3]

We regard the language of Lord Holt, in Hern *v.* Nichols,[4] as applicable, that "seeing that somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser, than a stranger."

The case of Seely *v.* The People,[5] is departed from so far as it conflicts with the principle of the present decision.

We are satisfied with the decree, and it is affirmed.

Decree affirmed.[6]

[1] 51 Me. 506. [2] 3 Ohio St. 302. [3] 21 Ill. 223.
[4] 1 Salk. 289. [5] 27 Ill. 173.

[6] Veach *v.* Rice, 131 U. S. 318; Stern *v.* People, 102 Ill. 540; Carr *v.* Moore, 2 Ind. 602; State *v.* Pepper, 31 Ind. 76; Helmes *v.* Wayne Co., 73 Ind. 325; Wayne Co. *v.* Cardwell, 73 Ind. 555; Cook *v.* Boyd, 16 B. Mon. 556; Terry *v.* Hazlewood, 1 Duv. 104; Hall *v.* Smith, 14 Bush, 611 (*semble*). (But see Commonwealth *v.* Campbell (Kentucky, 1898), 45 S. W. R. 89); York Co. *v.* Brooks, 51 Me. 506; Chase *v.* Hathorn, 61 Me. 505; Dole Co. *v.* Cosmopolitan Co., 167 Mass. 481; Graves *v.* Tucker, 18 Miss. 9 (*semble*); State *v.* Baker, 64 Mo. 167; State *v.* Hewitt, 72 Mo. 603; Lombard *v.* Mayberry, 24 Neb. 674; Kansas City *v.* Murphy, 49 Neb. 674; Mosher *v.* Carpenter, 13 Hun, 602; Vass *v.* Riddick, 89 N. Ca. 6; Salser *v.* Brock, 3 Ohio St. 302; Bigelow *v.* Comegys, 5 Ohio St. 256; Loew *v.* Stocker, 68 Pa. 226; Mitchell *v.* Burton, 2 Head, 613, *Accord.*

Sharp *v.* Allgood, 100 Ala. 183 (bond); Cornell *v.* People, 37 Ill. Ap. 490; Green *v.* Kindy, 43 Mich. 279, *Contra.*

The indorser of a note is liable thereon, although one or more of the names of prior parties may be forged. 2 Ames, Cases on Bills and Notes, 169, 231, 233, n. 3.

Similarly one who guarantees the payment of an instrument is not discharged by reason of the forgery of a signature which he believed to be genuine. Veazie *v.* Willis, 6 Gray, 90. — Ed.

BUTLER v. UNITED STATES.

IN THE SUPREME COURT, UNITED STATES, OCTOBER, 1874.

[*Reported in* 21 *Wallace*, 272.]

ERROR to the Circuit Court for the Eastern District of Tennessee.

Debt on a joint and several internal-revenue bond, executed by Emory as principal, and by Butler, Sawyer, and Choppin as sureties, the bond on oyer appearing to be in the sum of $15,000.

Butler pleaded that at the time he signed and affixed his seal to the bond, it was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; that the blanks were not filled, and there was no signature thereto except Emory's; that Emory promised, if Butler would sign the bond, he, Emory, would fill up the blanks with the sum of $4,000, and would procure two additional sureties in the District of Columbia, each of whom was to be worth $5,000; and that he, Butler, signed the bond and delivered it to Emory with the understanding and agreement that the bond was otherwise not to be binding on him, Butler, nor delivered to the United States, or to any of its agents or officers, but was to be returned to him; that Emory did not so fill up the bond, but, on the contrary, falsely and fraudulently filled it up with the sum of $15,000, and with the names of Sawyer and Choppin, neither of whom resided in the District of Columbia, and neither of whom was worth $5,000, but, on the contrary, both of whom were wholly insolvent and worthless; that Emory accordingly obtained the signature of him, Butler, by false and fraudulent representations; that the bond was therefore not the bond of him, Butler, when made, and that he had never afterward ratified or acknowledged its validity.

The Circuit Court, relying on Dair *v.* United States,[1] ruled that this was no defence to the action. The defendant excepted and brought this writ of error.[2]

The CHIEF JUSTICE delivered the opinion of the Court.

We cannot distinguish this case in principle from Dair *v.* United States. The printed form, with its blank spaces, was signed by Butler and delivered to Emory, with authority to fill the blanks and perfect the instrument as a bond to secure his faithful service in the office of collector of internal revenue. He was also authorized to present it when perfected to the proper officer of the government for approval and acceptance. If accepted, it was expected that he would at once be permitted to enter upon the performance of the duties of the office to which it referred.

It is true that, according to the plea, this authority was accompanied by certain private understandings between the parties intended to limit

[1] 16 Wall. 1.

[2] The report of the case is slightly abridged. — ED.

Butler v U.S.

Action on a sealed bond to secure faithful performance of duties by one Emory. Emory signed first, then D, on condition that Emory should get two more sureties, each worth $5,000, & that total of bond should only be $4,000. Neither of these things was done, the other sureties being worthless, & sum was $15,000.

It gave judgment for P. Butler gave Emory authority to fill it, & he had abstract authority to fill it as he wished & D must be liable. He could easily have safeguarded himself.

How about argument that authority to fill out a sealed instrument must also be under seal? But it would seem that one signing such an instrument would be an authority for any amt, & for any persons. The private arrangement is the real arrangement but was not under seal, & hence is invalid.

its operations, but it was apparently unqualified. Every blank space in the form was open. To all appearances any sum that should be required by the government might be designated as the penalty, and the names of any persons signing as co-sureties might be inserted in the space left for that purpose. It was easy to have limited this authority by filling the blanks, and the filling of any one was a limitation to that extent. By inserting in the appropriate places the amount of the penalty, or the names of the sureties or their residences, Butler could have taken away from Emory the power to bind him otherwise than as thus specified. This, however, he did not do. Instead, he relied upon the good faith of Emory, and clothed him with apparent power to fill all the blanks in the paper signed in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the government as security for the performance of his contemplated official duties. It is not pretended that the acts of Emory are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agreements. He acted in good faith, and the question now is, which of two innocent parties shall suffer. The doctrine of Dair's case is that it must be Butler, because he confided in Emory and the government did not. He is in law and equity estopped by his acts from claiming, as against the government, the benefit of his private instructions to his agent. *Judgment affirmed.*[1]

[1] N. Y. Co. *v.* Wilcox, 8 Biss. 197; Dolbeer *v.* Livingston, 100 Cal. 617; City *v.* Gage, 95 Ill. 593 (overruling People *v.* Organ, 27 Ill. 29); Donnell Co. *v.* Jones, 49 Ill. Ap. 327; Chalaron *v.* McFarlane, 9 La. 227; Dover *v.* Robinson, 64 Me. 183, 188 (*semble*); White *v.* Duggan, 140 Mass. 18; State *v.* McGonigle, 101 Mo. 353, 362 (*semble*); Richards *v.* Day, 137 N. Y. 183 (*semble*); Nesbit *v.* Albert, 85 Hun, 211; Gary *v.* State, 11 Tex. Ap. 527; Nelson *v* McDonald, 80 Wis. 605 (*semble*), *Accord.*

Cross *v.* State Bank, 5 Ark. 525; Smith *v.* Carder, 33 Ark. 709 (*semble*); Gourdin *v.* Read, 8 Rich. 230; Mills *v.* Williams, 16 S. Ca. 593 (but see Fowler *v.* Allen, 32 S. Ca. 229, 237); Rhea *v.* Gibson, 10 Grat 215, *Contra.*

To these cases *contra* should be added the following, in which it was decided that a surety who signed a sealed obligation containing blanks would not be chargeable even though the blanks were filled up in accordance with his parol authority: U. S. *v.* Nelson, 2 Brock. 64; Smith *v.* Carder, 33 Ark. 709; Richmond Co. *v.* Davis, 7 Blackf. 412; Lockhart *v.* Roberts, 3 Bibb, 361; Byers *v.* McClanahan, 6 Gill & J. 250; Williams *v.* Crutcher, 6 Miss. 71; Barden *v.* Southerland, 70 N. Ca. 528; Ayres *v.* Hayne, 1 Ohio, 368; State *v.* Boring, 15 Ohio, 507; Famelener *v.* Anderson, 15 Ohio St. 473; Gilbert *v.* Anthony, 1 Yerg. 69; Wynne *v.* Governor, 1 Yerg. 149; McNutt *v.* Mahan, 1 Head, 98; Mosby *v.* Arkansas, 4 Sneed, 324; Preston *v.* Hull, 23 Grat. 600; Penn *v.* Hamlett, 27 Grat. 337.

But generally in this country the completion of an obligation under seal in pursuance of the authority of a surety who has executed it in blank binds the surety as effectually as his execution of a completed specialty. See, in addition, the cases cited in the first paragraph of this note; Gibbs *v.* Frost, 4 Ala. 720; State *v.* Pepper, 31 Ind. 76, 85–86 (*semble*); Wright *v.* Harris, 31 Iowa, 272; Lee Co. *v.* Welsing, 70 Iowa, 198; Rose *v.* Douglass Township, 52 Kas. 451; South Berwick *v.* Huntress, 53 Me. 89; State *v.* Young, 23 Minn. 551; Green Co. *v.* Wilhite, 29 Mo. Ap. 459; *Ex parte* Kerwin, 8 Cow. 118; Wiley *v.* Moore, 17 S. & R. 438; Gourdin *v.* Read, 6 Rich. 597,

LUCAS AND ANOTHER v. OWENS.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1887.

[*Reported in* 113 *Indiana Reports*, 521.]

MITCHELL, C. J. Thomas J. Owens brought this suit against Andrew W. Johnson and Sarah C. Lucas, joint makers of a promissory note, which fell due in one year from the date thereof, and called for the payment of $760 and interest.

Mrs. Lucas, in the second and fourth paragraphs of her separate answer, set up as a defence that her co-defendant, Johnson, had induced her to sign the note sued on as his surety, by means of certain false and fraudulent representations, which are particularly set out, and which she alleges were relied on by her.

Without setting out the facts pleaded in any greater detail, it is sufficient for the purposes of this case to say they show that Mrs. Lucas, without any contributory fault or neglect on her part, was induced by her co-defendant to sign the note in suit under such circumstances as would entitle her to be relieved therefrom as against the principal, Johnson, if he were claiming any benefit from the contract. As, however, there is nothing in the answer tending to show that the payee was guilty of any fault or neglect, or that he knew, or had any reason to suspect, that Mrs. Lucas had been induced to sign the note by the misconduct of any one, it is difficult to discover any principle upon which he can be compelled to exonerate the surety, after having accepted the note and parted with the consideration thereof in good faith.

A surety who has been misled by the principal as to the character and extent of an obligation, signed and assumed at the request of the latter, cannot make the fraud of the principal available as a defence, unless he can also show that the payee or obligee participated in, or had knowledge of, the fraud or deception. Western, &c. Ins. Co. *v.* Clinton;[1] Casoni *v.* Jerome;[2] Ladd *v.* Board of Trustees;[3] Griffith *v.* Reynolds;[4] Quinn *v.* Hard;[5] Brandt, Sur. § 353.

The payee who parts with a consideration, and accepts the note in good faith, is not bound to ascertain whether the sureties, whose genuine signatures appear thereon, fully understood the nature and extent of their obligation. He has a right to assume that they exercised care, and understood the character of the contract to which they signed their

8 Rich. 230; Mills *v.* Williams, 16 S. Ca. 593; Lafferty *v.* Lafferty, 42 W. Va. 782 (*semble*).

Bills and Notes signed by a Surety in Blank. A surety who signs negotiable paper in blank, like any other party to such paper, is liable to a *bona fide* holder even though the blanks were filled up in violation of instructions. Joseph *v.* First Bank, 17 Kas. 256; Roberson *v.* Blevins, 57 Kas. 50; Fullerton *v.* Sturges, 4 Ohio St. 529; Wessell *v.* Glenn, 108 Pa. 104; Johnston Co. *v.* McLean, 57 Wis. 258, are a few of many cases on this point. — ED.

[1] 66 N. Y. 326. [2] 58 N. Y. 315. [3] 80 Ill. 233.
[4] 4 Grat. 46. [5] 43 Vt. 375.

names; nor can he be held responsible for the misconduct or deception by which the principal induced them to sign the note. Mrs. Lucas being under no disability, and having signed the note intentionally, she cannot avoid liability to the payee, who acted in good faith, by showing that she was overreached by her co-defendant, the principal.[1]

Assuming that both the surety and the payee were equally without fault, since one of two innocent persons must suffer by the wrong of a third person, the loss must fall upon the one who put it in the power of the wrong-doer to cause the loss. Hunter *v.* Fitzmaurice;[2] Helms *v.* Wayne Agricultural Co.;[3] Preston *v.* Witherspoon;[4] Quick *v.* Milligan;[5] Houck *v.* Graham;[6] Schmidt *v.* Archer.[7]

Judgment affirmed, with costs.

G. H. HARDING, Respondent, *v.* W. I. TIFFT, Appellant.

In the Court of Appeals, New York, December, 1878.

[*Reported in* 75 *New York Reports*, 461.]

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

[1] Stone *v.* Compton, 5 Bing. N. C. 142 (*semble*); Spencer *v.* Handley, 4 M. & Gr. 414 (*semble*); Maitland *v.* Irving, 15 Sim. 437 (*semble*); Wallace *v.* Wilder, 13 Fed. Rep. 707; Marks *v.* First Bank, 79 Ala. 550; Anderson *v.* Warne, 71 Ill. 20; Booth *v.* Storrs, 75 Ill. 438; Ladd *v.* Board, 80 Ill. 233; Davis Co. *v.* Buckles, 89 Ill. 237; Jenners *v.* Howard, 6 Blackf. 238; Lepper *v.* Nuttman, 35 Ind. 384; Craig *v.* Hobbs, 44 Ind. 363; Jones *v.* Swift, 94 Ind. 516; Glenn *v.* Statler, 42 Iowa, 107; Monroe Bank *v.* Anderson Co., 65 Iowa, 692; Martin *v.* Campbell, 120 Mass. 126; Beath *v.* Chapoton (Mich. 1898), 73 N. W. R. 806; Graves *v.* Tucker, 18 Miss. 9 (*semble*); Linn Co. *v.* Farris, 52 Mo. 75, 77; Coleman *v.* Bean, 1 Abb. Ap. 394; McWilliams *v.* Mason, 31 N. Y. 294; Casoni *v.* Jerome, 58 N. Y. 315; Western Co. *v.* Clinton, 66 N. Y. 326, 331; Howe Co. *v.* Farrington, 82 N. Y. 121, 127; Powers *v.* Clark, 127 N. Y. 417, 422, 423; Page *v.* Krekey, 137 N. Y. 307, 312, 313; Brown *v.* James, 2 N. Y. Ap. Div. 105; Rothschild *v.* Frank, 14 N. Y. Ap. Div. 399; Riley *v.* Johnson, 8 Ohio, 526 (*semble*); Johnston *v.* Patterson, 114 Pa. 398; Rothermal *v.* Hughes, 134 Pa. 510; Kulp *v.* Brant, 162 Pa. 222; Riley *v.* Reifert (Texas Civil Appeals, 1897), 32 S. W. R. 185; Quinn *v.* Hard, 43 Vt. 375; Griffith *v.* Reynolds, 4 Grat 46, *Accord.*

Duress. A surety cannot defend on the ground of duress practised upon him by the principal, unless the obligee took the obligation *mala fide*. Fairbanks *v.* Snow, 145 Mass. 153. Holmes, J., said in this case, p. 154: "The ground upon which a contract is voidable for duress is the same as in the case of fraud: and is, that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action. See Rodliff *v.* Dallinger, 141 Mass. 1, 6; Stiff *v.* Keith, 143 Mass. 224. But if duress and frand are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence." — Ed.

[2] 102 Ind. 449. [3] 73 Ind. 325. [4] 109 Ind. 457.
[5] 108 Ind. 419. [6] 106 Ind. 195. [7] 113 Ind. 365.

This action was upon a promissory note for $500, made by defendants Skinkle & Howlet, and indorsed by defendant Tifft, for their accommodation. The answer set up a payment of $275.

The facts appear sufficiently in the opinion.

D. A. King, for appellant.

H. L. Howe, for respondent.[1]

RAPALLO, J. The point upon which the appellant relies for the reversal of the judgment in this action is, that on the trial the Court excluded evidence of the fact that the sum of $275 which was paid in June, 1873, by Skinkle to the plaintiff, had been raised by Skinkle by use of the name of the defendant as an accommodation indorser, for the purpose of being applied towards the payment of the note in suit. It was not proved or offered to be proved that knowledge of this fact was communicated to the plaintiff. Skinkle testified that in the spring before the payment he told the plaintiff that he would make a payment on a $400 note which the plaintiff held against the firm of Skinkle & Howlet without any indorser, if he could get it out of their business, and that he would pay on the note in suit, indorsed by the defendant, if he got it on a note indorsed by him, and that four or five days before the payment he told the plaintiff that he had found where he could get the money to pay on the note in suit. But he testified that he could not say that he told the plaintiff how or on whose indorsement he was going to get the money, and he does not say that he ever told plaintiff how he got it.

Skinkle further testified that when he made the payment he told plaintiff that he had come to pay $275 on the note indorsed by the defendant. That plaintiff took the money, counted it and took out a paper which the witness supposed was the note, and wrote on the back of it. The plaintiff contradicted Skinkle's statements to the effect that the payment was made on the note in suit, and gave evidence tending to show that it was made on the $400 note; he also testified that at the time of the payment he indorsed it on the $400 note in presence of the defendant, but that he did not know whether the defendant noticed the note. That he did not know that the money had been raised on the defendant's indorsement. The $400 note was produced at the trial, bearing the indorsement of the payment.

It is conceded that if the money paid to the plaintiff had been raised on the credit of the defendant for the purpose of being applied on the note indorsed by him, and this fact was communicated to the plaintiff, he would have bound himself by accepting the money to apply it on that note. But in the absence of any such knowledge, it is claimed on the part of the plaintiff that he had the right to apply the money paid him by Skinkle, to the unindorsed note, unless Skinkle directed that it be applied on the note in suit, and that the fact that it had been raised by Skinkle on the defendant's indorsement, if unknown to the plaintiff, would not affect that right.

[1] The arguments of counsel are omitted. — ED.

Df's name was used as indorser in raising of money by P to make payment on a note on wh Df was surety. This fact was not communicated to plf who applied the payment to another unsecured note of P. Jury found plf was not directed to apply to secured note.

J for plf. Cr has an option, he was under no duty to df

The question whether Skinkle directed the payment to be applied on the note in suit, as stated by him in his testimony, was submitted to the jury, and their verdict establishes that no such direction was given. The evidence as to the means by which Skinkle raised the money was not material on that issue. But it is claimed by the defendant that, assuming that no direction was given by Skinkle to apply the payment on any particular note, the fact that the money had been raised on a note indorsed by the defendant for the express purpose of being paid on the note in suit, entitles him now to have it thus applied notwithstanding the application actually made by the plaintiff at the time. It is not disputed that a creditor having two demands against a debtor may apply a payment received from the debtor to either of the demands, at his election, provided no direction is given by the debtor, and the verdict establishes that no such direction was given in the present case to apply the payment on the note in suit. But it is contended that the right of the creditor to make the application is subject to the condition that such application be not inequitable, and such is the language used in some of the authorities cited. The equities referred to, however, are usually equities existing between the debtor and creditor, and I have found no case recognizing those arising out of transactions between the debtor and third persons, of which the creditor has no notice. The mere fact that there is a surety for one of the debts does not preclude the creditor from applying a payment thus received to the debt for which he has no security. Allen *v.* Culver;[1] Stone *v.* Seymour.[2] If the money had been raised by the debtor by the aid of the indorsement of the surety, given for the express purpose of enabling the debtor to raise funds to pay the secured debt, and these facts had been communicated to the creditor, he would not be permitted even with the consent of the debtor to misapply it. But it can hardly be disputed that if the debtor brought money thus raised to the creditor, and paid it to him expressly upon the unsecured debt, without disclosing the means by which the money had been raised or any agreement as to its use, the payment would be valid. I think the same result follows when the debtor, by omitting to specify on which debt the payment is to be credited, authorizes the creditor to apply it to either, and the creditor exercises this option. The money belongs to the debtor, and where the creditor is ignorant of any duty on the part of the debtor in respect to it, he may receive and apply it as if no such duty existed. If no application had been made by either party, and the duty were cast upon the Court of making the proper application, the equities of the surety would doubtless be considered. But where the application has been made by the creditor, in accordance with his apparent legal right, and in ignorance of any fact which should prevent him from making such application, I do not think he is bound to change it on the subsequent disclosure that a third party had an interest in

[1] 3 Den. 285. [2] 15 Wend. 20.

having it otherwise applied, and that the debtor had violated a duty to such third party in not directing such application. The application made by the creditor cannot be said to have been inequitable if no facts were brought to his knowledge at the time, showing that he ought not to make it; it would create great confusion in commercial dealings to hold that after the lapse of time, and when the position of the parties may have been changed by such a payment, the transaction could be reopened and the creditor obliged to revive an unsecured debt which he had treated as paid, and apply the payment on a debt for which he had ample security. The loss, if any, sustained by the surety in such a case results from the act of his principal in whom he placed confidence, and not from any improper act of the debtor. It does not appear that the plaintiff was ever apprised, until the trial of this action, of the allegation as to the means by which the money had been raised. He had the right in the meantime to repose upon the payment of the unindorsed note, and if he had attempted to collect that, the fact of the payment, and the indorsement of it on that note, would have been a good defence. The defence set up in the answer in this action and testified to at the trial was the express payment on the note in suit. If that was true, the evidence as to the means whereby Skinkle raised the money was immaterial, and it was excluded on that ground. But in any aspect of the case it was properly excluded.

The judgment should be affirmed.

All concur, except MILLER and EARL, JJ., absent.

Judgment affirmed.[1]

[1] Compare Merchants' Co. v. Herber (Minnesota, 1897), 71 N. W. R. 624. — ED.

SECTION XIII.

Surety's Defences growing out of Dealings or Relations between the Creditor and Co-Surety.

Ex parte GIFFORD.

IN CHANCERY, BEFORE LORD ELDON, C., APRIL 27, 1802.

[*Reported in* 6 *Vesey*, 805.]

MARSHALL and Haigh, creditors of Bedford upon a promissory note, requiring farther security, Bedford, Niblock and Burgess, and Baylis, joined in a promissory note, as a collateral security. Niblock and Burgess and Bedford became bankrupts. Marshall and Haigh proved the whole debt under each Commission; and afterwards brought an action against Baylis; who entered into a composition with his creditors; under which Marshall and Haigh received a dividend of 4*s.* in the pound; the receipt for which was expressed to be for £191 and two notes, which, when duly paid, will be in full of the said debt and all other demands from him. The dividend paid by the estate of Bedford was 4*s.* in the pound; and that by the estate of Niblock and Burgess 5*s.*

The prayer of this petition was, that the proof against the estate of Niblock and Burgess may be expunged.

Mr. Romilly and *Mr. Whishaw*, in support of the petition.

Mr. Richards, *Mr. Alexander*, and *Mr. Cooke*, *contra*.[1]

Lord CHANCELLOR [ELDON]. — Clearly it is impossible upon any principle, regulating cases of this nature, that relief can be given to the extent prayed by this petition: and it also strikes me that the decision of any question, that may arise in these bankruptcies, is somewhat premature: the question depending upon the *quantum* of dividend, that the respective estates will pay. These parties as between them respectively and Bedford, are to be considered in the situation of principal and surety; and, as between themselves, upon the principle of co-sureties. As to Bedford, he is to pay the debt in equitable consideration in relief of both; and proof being made against his estate, if the holder thought proper to receive a sum of money in discharge of his estate, the case *Ex parte* Smith[2] and many others would have entitled the surety to say, that if his estate was discharged, without any reserve of the remedy against the sureties, they would be discharged; first, upon this principle unquestionably: that the sureties, if they paid the

[1] The arguments of counsel are omitted. — ED.

[2] 3 Bro. C. C. 1, 1 Cooke, Bankr. Law (8th ed.), 190.

debt, would have been entitled to stand in the place of the creditor in respect of the proof against the estate of the principal; and therefore, when it is stated in some cases, that it is for the interest of the surety, that the compromise shall be made, the answer is, those, for whose benefit it is alleged to be made, are the proper judges, whether it is for their benefit; and it is not to be forced upon them: they having a clear equitable remedy to stand in the place of the creditor proving.

Another ground, upon which it has been reasoned in some cases, is, that upon the faith of such a transaction with the principal, if there was no reserve of the remedy against other persons liable, in order to secure the intended effect of such a contract to discharge him upon such a payment, you must almost of necessity infer, that the party is not to take a remedy over against others, which would forthwith bring upon the party discharged all the evil, from which the prior moment the other had agreed to discharge him. Suppose 4*s.* in the pound paid by the principal, nothing being said about remainder of the debt: it would be a very bad bargain, if the creditor could send another person, either upon the same instrument or a contract implied by the law, to take the debtor in execution for the remainder of the debt, for which that composition was made. The Court would therefore be inclined to infer, that it was not intended that the person discharged should still remain liable. But certainly he might so frame his contract; and there are many cases, in which it is not imprudent for the debtor to make the composition with a reserve of the remedies, either understood, or an express declaration to that effect. There would be nothing imprudent in the debtor so doing in this very case; unless it turns out, that the surety shall pay to an extent, in which he would be prejudiced, if barred of the remedy against the co-sureties.

With respect to co-sureties the case is different, but governed by principles in some degree the same. The principal is to discharge all the obligations of all the sureties: but they stand with regard to each other in a relation, which gives rise to this right among others; that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion, which in all events he is to pay. The party has a right to say for himself, he will not consider the relation; but will take 6*s.*; though the surety is liable to pay 10*s.* He may say, he will be passive as to the other 4*s.*; or he will discharge the whole debt, and at his own risk as to the remedy against the other surety; or he may reserve the remedy against the co-surety expressly. It depends upon the effect and terms of the bargain actually entered into. It might be prudent in this very case for Baylis, Bedford's son-in-law, to say he would pay 4*s.* in the pound; recollecting, that Niblock and Burgess must pay more than 10*s.* in the pound, before any demand could be made by them against Baylis; and recollecting the remedies against Bedford. The question therefore is, under the circumstances what did they mean? As to the receipt the creditor contends, there is no difference whether there is an express reservation

Ex Parte Gifford.

Note made by Bedford P., and S' S² & S³ jointly. All went broke, and proof made against estate of all three. full amt. S³ entered into composition agreement whereby he was to pay 4S in pound which was to be in full of the debt & all other demands against him. Bedford paid 4S in pound & others were about to pay 5S. motion that proof against estate of S' & S² be expunged.

At denied motion. 1 of Co's is that if one pays more than his proportion, he shall have it of contribution against the other co assertes. Here it is not determined whether its of contribution of S' & S² will ever arise against S³, or not, & hence the motion cant be granted on the present state of facts.

Victim that Ds are discharged by a release or composition with P, unless Ds are expressly reserved.

Bedford,	Nutbrook,	Burgess.	Baylis
4S	5S	5S	4S
			£240 pd

Marshall & Haigh
assume debt £1200

400	400	400

What does it mean? I only mean that S' & S^2 are jointly & severally liable & I don't mean that S' & S^2 are entitled to proof — & estate is allowed.

Thompson v Lach

Δ, & C & P Lach jointly & severally guaranteed the payment of annuity by one John Lach to Π. Π then released C. P. Lach, that being a reservation that nothing therein should prejudice his rts against Δ, whom Π now sues.

Held that release did not discharge Δ, since it was qualified, & reserved the remedy against Δ.

But what remedy does Δ have then? Is he only liable for a pro rata share of total? Or must he pay all, & have his rt of contribution for C's & P's share thru subrogation to Π, despite the terms of the release?

Pro rata discharge would seem better.

of the remedies against the co-sureties, but that distinction has been taken. At the time of Mr. Richard Burke's Case Lord Thurlow admitted, that, if there is a reserve of the remedies against the others, there is consent of the party, with whom the composition is made; and if out of that a demand arises against him, it is a demand, which began to exist with his consent expressed in the terms of the contract, and under some circumstances wisely and prudently given; for the party would not have entered into the contract, unless he was allowed to contract for that remedy over against the co-sureties. If Niblock and Burgess should not pay more than their moiety, the contract would be a beneficial contract for Baylis; for though paying more than Baylis they would not pay enough to bring an assumpsit against him. That would not therefore be an imprudent bargain for Baylis to make. It may however never be necessary to decide this; as it depends upon what dividends the estate of Bedford and of Niblock and Burgess pay. But I have a strong opinion, that under the circumstances the other persons liable upon this note are discharged, because Baylis was contented to make a bargain, the effect of which leaves him to his chance as to his ultimate liability between him and his co-surety; and therefore that relief cannot be given even to the extent, to which it is now modified.

The order was, that under the present circumstances the petition should be dismissed without costs, and without prejudice to presenting any other petition.[1]

[1] It is generally agreed that an agreement by the creditor never to sue a surety, or the equivalent of such an agreement in the form of a parol release, will discharge a co-surety only so far as it would deprive the co-surety of his right of reimbursement for payment of more than his share of the common obligation. Jemison *v.* Governor, 47 Ala. 390; Saint *v.* Wheeler, 95 Ala. 362, 374 (*semble*); Lewis *v.* Armstrong, 80 Ga. 402, 87 Ga. 466; Thomason *v.* Clark, 31 Ill. App. 404; Thompson *v.* Adams, Freem. Ch. (Miss.) 225; Fletcher *v.* Grover, 11 N. H. 368 (*semble*); Currier *v.* Baker, 51 N. H. 613 (*semble*); Morgan *v.* Smith, 70 N. Y. 537; Benedict *v.* Lea, 35 Hun, 34; Schock *v.* Miller, 10 Barr, 401; Waggener *v.* Dyer, 11 Leigh, 384, *Accord.*

But see Stockton *v.* Stockton, 40 Ind. 225.

If the creditor at the time of his agreement never to sue the surety expressly reserves all his rights against the co-surety, the latter will continue liable for the full amount of the obligation. Deering *v.* Moore, 86 Me. 181; Morgan *v.* Smith, 70 N. Y. 537. — Ed.

THOMPSON AND OTHERS v. E. J. LACK.

IN THE COMMON PLEAS, NOVEMBER 18, 1846.

[*Reported in* 3 *Common Bench Reports*, 540.]

COVENANT. The plaintiffs counted upon a covenant whereby the defendant and C. P. Lack jointly and severally guaranteed the payment of an annuity by John Lack. The defendant pleaded, with a profert, a release by the plaintiffs of his co-guarantee, C. P. Lack. The release being enrolled, contained a proviso that nothing therein contained should prejudice the rights of the plaintiff against the defendant. The plaintiff demurred.

Dowling, Serjt., for the plaintiffs.

Channell, Serjt., for the defendants.[1]

WILDE, C. J. With respect to the third plea, the question is, what is the effect of the deed which is therein described as a release? Are you at liberty to separate that which professes to be a release, from the proviso? or must you take them both together, and say what is their entire effect? It seems to me, that you must look at the whole of the deed; and that raises the point, whether a party *may* give a qualified release. Solly *v.* Forbes[2] is a decision that you may give such a release; and, although in Nicholson *v.* Revill[3] there are to be found expressions used by Lord Denman, in delivering the judgment of the court, inconsistent with that view, it seems to me that those expressions are more of the nature of *obiter dicta* than those attributed to Lord Eldon in *Ex parte* Gifford. In the latter case, Lord Eldon decided, in conformity with the principle established by Solly *v.* Forbes, — which I consider is a decisive authority, — that a release may be qualified, and prevented operating as a discharge of a co-surety.[4] The question here is, whether the release in this deed is qualified, and reserves the remedy against the defendant. It is admitted that the intention of the parties is clear; and strong grounds should be laid before the court to induce it not to give effect to the deed according to such intention. I see nothing in the present case to prevent us from deciding in conformity with Solly *v.* Forbes. Generally speaking, a release of one will operate as a discharge to all. Therefore, in Nicholson *v.* Revill, the plaintiff having received a sum of

[1] The statement of the case is abridged, and the arguments and concurring opinions of COLTMAN and MAULE, JJ., are omitted. — ED.

[2] 2 Bro. & B. 38.

[3] 4 A. & E. 675.

[4] A similar distinction prevails in the Roman law: — "In his qui ejusdem pecuniæ exactionem habent in solidum, vel qui ejusdem pecuniæ debitores sunt, quatenus alii quoque prosit aut noceat pacti exceptio, quæritur: et in rem pacta omnibus prosunt quorum obligationem dissolutam esse ejus qui paciscebatur interfuit: itaque debitoris conventio, fidejussoribus proficiet." "Nisi hoc actum est *Ut dumtaxat a reo non petatur, a fidejussoribus petatur:* tunc enim fidejussor exceptione non utetur." *Dig.* lib. 2, tit. 14, l. 21, § 5, l. 22.

money from one of the parties to a promissory note, and having erased his name from the instrument, it was held, that such erasure operated as a release to the other parties thereto; and what was necessary for the decision of that case, was in accordance with the general principle. I am of opinion that this was a qualified release, and did not discharge the co-surety. I think, therefore, the general demurrer sustainable by the deed as set out on oyer. *Judgment for the plaintiffs.*[1]

JACQUES GOSSERAND *v.* JEAN B. LACOUR AND OTHERS.

IN THE SUPREME COURT, LOUISIANA, MARCH, 1853.

[*Reported in* 8 *Louisiana Annual Reports*, 75.]

APPEAL from the District Court, Ninth District. FARRAR, J.

Suit on the following promissory note.

$3,543. POINTE COUPEE, ce 29 Juin, 1849.

Dans tout Mars, mille huit cent cinquante, nous Jean B'te Lacour comme principal, et Madame V. Pierre Gondran, et Monsieur Jean

[1] Kearsley *v.* Cole, 16 M. & W. 128, 136, Per Parke, B.; Price *v.* Barker, 4 E. & B. 760, *supra*, 147, 150, n. 2, s. c.; Pegram *v.* Riley, 88 Ala. 399 (*semble*); Glasscock *v.* Hamilton, 62 Tex. 143, 168–169; Richardson *v.* Overleese (Texas Civil Appeals, 1897), 44 S. W. R. 308; Hewitt *v.* Adams, 1 Pat. & H. 34; Macdonald *v.* Whitfield, 27 Can. S. C. 94, *Accord*.

Similarly, a creditor may release a surety as to his proportion, reserving his rights against a co-surety for the latter's proportion. Hood *v.* Hayward, 124 N. Y. 1; and there is a disposition, in some jurisdictions, to treat an ordinary release of a surety as if it contained such a reservation of rights against the co-surety. Gordon *v.* Moore, 44 Ark. 349; Smith *v.* State, 46 Md. 617; State *v.* Matson, 44 Mo. 305. In Massey *v.* Brown, 4 S. Ca. 85, the court allowed the release to be interpreted in this sense by the aid of parol evidence of such an intention. — ED.

UNQUALIFIED RELEASE OF A SURETY in a joint or joint and several obligation discharges his co-surety in the same obligation. Nicholson *v.* Revill, 4 A. & E. 675; Evans *v.* Bremridge, 2 K. & J. 174, 183; Kearsley *v.* Cole, 16 M. & W. 128 136; Price *v.* Barker, 4 E. & B. 160, 777, *supra*, 147, 148, s. c.; Ward *v.* Nat. Bank, 8 App. Cas. 755, 764 (affirming s. c. L. R. 1 New Zealand, 51); Mercantile Bank *v.* Taylor, 93 A. C. 317 (affirming s. c. L. R. 12 N. S. Wales, 252); People *v.* Buster, 11 Cal. 215; Spencer *v.* Houghton, 68 Cal. 82; Deering *v.* Moore, 86 Me. 181 (*semble*).

But in Gordon *v.* Moore, 44 Ark. 349; Smith *v.* State, 46 Md. 617; State *v.* Matson, 44 Mo. 305; Massey *v.* Brown, 4 S. Ca. 85, such a release, though effectual at law, was considered to exonerate the co-surety only *pro tanto* in equity.

By statute, in some jurisdictions, a release of one surety on payment of a part of the joint indebtedness does not discharge the co-surety from the rest of the debt. State *v.* Atherton, 40 Mo. 209; Alford *v.* Baxter, 36 Vt. 158.

MERGER. In Chick *v.* Farr, 31 S. Ca. 463, it was adjudged that the fact that a surety became the administrator of the principal obligor did not discharge a co-surety.

DISCHARGE IN BANKRUPTCY. The discharge in bankruptcy of one surety does not affect the creditor's rights against a co-surety. Sacramento Co. *v.* Bird, 31 Cal. 66. — ED.

B'te Decuir comme la caution, promettons de payer solidairement et l'un pour l'autre, à l'ordre de Monsieur Jacques Gosserand, la somme de trois mille cinq cent quarante-trois piastres pour valeur reçue, avec interêt à huit pour cent l'an depuis l'echéance jusqu'à parfait paiement.

[Signed] JEAN B. LACOUR,
JEAN B. DECUIR,
CHAS. HAGAN, temoin. V. P. GONDRAN.

SLIDELL, J.[1] On the face of the note we consider Madame Gondran and J. B. Decuir bound as sureties *in solido*.

It is undisputed that Gosserand, the holder of the note, gave time to Madame Gondran; and the question arises whether this agreement affected, and if so, to what extent, the liability of her co-surety Decuir, and his heir Mrs. Lejeune.

By the Article 3032 of the Code of 1825, it is said, the prolongation of the term granted to the principal debtor, without the consent of the surety, operates a discharge of the latter.

It is argued for the plaintiff that this article does not in terms cover the case of time given to a co-surety. This is true. But we consider its spirit applicable to the present question, especially when we revert to the pre-existing law, and the reasons suggested by the jurisconsults who prepared the amended Code, which is the law of this contract.

In the Code of 1808, under the head "Extinctions of Suretyship," is the following Article. "The simple prorogation of the term granted by the creditor to the principal debtor, does not exonerate the surety, who may in this case sue the said debtor, to compel him to make payment."

In presenting the amendment which was adopted by Article 3032, above cited, the jurisconsults submitted to the Legislature the following remarks: —

"This is an innovation on the principles acknowledged by authors, and an entire change of the provision as it existed before, in which it is declared that a mere prorogation of the term granted to the debtor should not discharge the surety. It is proper, therefore, that we should state the reasons which have induced us to propose this amendment.

"Pothier, from whom principally the French Code has adopted a provision similar to that which we propose to abolish, gives as a reason for his opinion, that where the creditor accords the debtor a prorogation of the time, this does not prevent the surety from acting against the debtor, and providing for his indemnity, if he perceives that the fortune of the debtor is beginning to diminish.

"Notwithstanding the respect due to an authority of such weight, we do not think that this doctrine is in accordance with general principles, as applicable to matters of suretyship, nor that it is just to drive the surety to this recourse. The obligation which the surety

[1] A portion of the case is omitted. — ED.

Gosserondo Lacour et al

Joint & several note made by Lacour, Decuir & V.P. Gondran. held by π & after maturity π gave time to Gondran, & question is as to how this affected the liability of Decuir.

Held that it discharged co-sureties pro tanto, i.e. in this case to the extent of 1/3. Reason is that if D had ∂ come to pay at maturity, or there after, D could not then be subrogated to π's ∂ against co sureties, & this interference is so great as to discharge π entirely to the extent that the co-sureties are liable.

Engensmith v Engensmith

A.K. gave a note to S.K. on which J.K. and H.K. were sureties. Note was joint & several, and was under seal. After maturity H.K. had notified P to sue on note, else he would consider himself discharged. Suit was not brot. now J.K. is sued on note. A.K. being insolvent. J.K. contends he is discharged, because H.K. is.

Ct gave judgment for P. Note is several, & the D is only released to the extent that he can recover against the co-sureties & to no greater extent.

contracts is to pay at the time fixed by the contract, if the debtor himself does not. This security is given for a limited time. When the time of performing the obligation arrives, the surety should have the right of insisting on the execution of the contract, that he may be discharged, or at least that he may be informed of the amount which he has to pay. To prolong his obligation beyond the term fixed, is to force him beyond his undertaking; to subject him to conditions to which he did not mean to submit. In fine, *it is changing his contract.*" See Amendments, p. 119.

If we apply the spirit of these remarks and of the amendment to the case before us, how does the matter stand?

Mrs. Decuir had a right, as surety, to be subrogated to the rights of the plaintiff, under the original contract, against her co-surety to the extent of their share of liability, which *inter se* her co-surety was bound to have. For being bound as sureties *in solido*, either, on paying the whole debt, had a right to resort to the co-surety to reimburse one half. But if the appellant had paid the plaintiff the whole claim, and demanded a subrogation of the rights of the plaintiff against Madame Gondran, the plaintiff could not have given it. By his agreement he was estopped from present suit. Thus the co-surety's right under the contract had been changed, to the co-surety's detriment, by the act of the creditors; and therefore, in our opinion, the co-surety's liability was *pro tanto* discharged.

We are of opinion, therefore, that the judgment against the appellant for the whole amount of the note and interest was erroneous, and that the judgment should be reduced by one half, being the amount of the share of the co-surety, Mrs. Gondran.

It is, therefore, decreed that the judgment of the court below against Mrs. Margaret Decuir, wife of Ovid Lejeune, be reversed, and that the said plaintiff recover of the said Margaret Decuir the sum of $1771.50, with interest thereon from the 3d April, 1850, until paid, at the rate of eight per cent. per annum and costs of the suit against her in the court below, the costs of the appeal to be paid by the plaintiff.[1]

KLINGENSMITH v. KLINGENSMITH'S EXECUTOR.

IN THE SUPREME COURT, PENNSYLVANIA, 1858.

[*Reported in* 31 *Pennsylvania Reports*, 460.]

ERROR to the Common Pleas of Westmoreland county.

This was an action of debt, by Sarah Klingensmith and John Klingensmith, her husband, for the wife's use, against P. Klingensmith, exe-

[1] Stirling *v.* Forrester, 3 Bligh, 575; Dunn *v.* Slee, 1 Moore, 2 Holt, N. P. 399; Draper *v.* Weld, 13 Gray, 580; Ide *v.* Churchill, 14 Oh. St. 372, *Accord.* — ED.

cutor of John Klingensmith, Jr., deceased, on a note under seal, for the payment of $169.

Sarah Klingensmith, prior to her marriage, loaned $169 to A. Klingensmith; and for this sum he gave the note in question, dated the 5th April, 1854, with John Klingensmith, Jr., and Henry Knappenberger, as sureties. The note was joint and several, and under seal.

A. Klingensmith, the principal, became insolvent; both the sureties died; and separate suits were instituted by the plaintiffs against their representatives.

This action was defended, on the ground that the defendant's testator had been discharged, by a neglect to sue the principal debtor, after a notice given to the plaintiffs by Henry Knappenberger, the co-surety.

The evidence for the defence consisted in proof that a son of Knappenberger, the co-surety, who was aged and infirm, called on the plaintiffs, and said he was sent by his father, to say that he wanted them to push that note, or his father would not stand good for it any longer.

The court below, in answer to points presented by the plaintiffs' counsel, declined to charge the jury that there was no evidence of any authority in Knappenberger's son, to give the notice proved; but left it as a question of fact for the jury, and instructed them, that if Knappenberger was discharged, by the omission of the plaintiffs to sue after notice, then this would operate also to discharge John Klingensmith, Jr., his co-surety.

To this charge the plaintiffs excepted; and a verdict and judgment having been rendered for the defendant, the plaintiffs removed the cause to this court, and here assigned such charge for error.

W. A. Cook, for the plaintiffs in error, cited Hays *v.* Lynn, 7 Watts, 525; Moore's Executors *v.* Patterson, 4 Casey, 512; Story's Eq. § 498; Schock *v.* Miller, 10 Barr, 402–4.

The opinion of the court was delivered by

LOWRIE, C. J. It seems to us that there was no error in the admission of evidence, nor in the application of it. But there is error in the answer to the plaintiff's third proposition. The action is against one of two sureties. The other had been discharged, by the neglect of the plaintiff to sue the principal after due notice. This does not discharge both, where by law a several action may be brought. The surety not discharged may be sued for his proportion of the amount. This principle is so well stated and justified by Mr. Justice ROGERS, in the case of Schock *v.* Miller, 10 State Rep. 401, that we may content ourselves with referring to that decision.[1]

Judgment reversed, and a new trial awarded.

[1] Wilson *v.* Tebbetts, 29 Ark. 579; Gordon *v.* Moore, 44 Ark. 349, 358; Trustees *v.* Southard, 31 Ill. Ap. 359; Routon *v.* Lacy, 17 Mo. 399, *Accord*.

In Alabama and Virginia, the co-surety is released altogether by the creditor's failure to proceed against the principal at the request of the surety. Towns *v.* Riddle, 2 Ala. 194; Wright *v.* Stockton, 5 Leigh, 153. In Kentucky, on the other hand, by stat-

DODD v. WINN.

IN THE SUPREME COURT, MISSOURI, OCTOBER TERM, 1858.

[*Reported in* 27 *Missouri Reports*, 501.]

ERROR to Ralls Circuit Court.

This was an action in favor of Levi Dodd against Isham O. Winn, on a promissory note executed by David C. Glascock, M. McDonald, R. F. Richmond, Minor J. Winn, James G. Caldwell, and said Isham O. Winn. The jury found the following special verdict: "We, the jury, find a special verdict as follows: On the 6th day of April, 1849, the plaintiff Dodd sued Minor J. Winn, on the same note now sued on, before the recorder of the city of Hannibal, the said Minor being one of the obligors in the note. Said Dodd recovered a judgment before said recorder against said Minor on the 6th day of April, 1850; and an execution was issued by said recorder on said judgment on the 11th day of April, 1850, and placed in the hands of the marshal of said city, and by him levied on a house in said city as the property of Minor J. Winn; that said marshal advertised said house for sale under said execution, but did not sell the house, being ordered by the plaintiff's counsel to tear down the advertisements and return the execution 'no property found;' which he did; and no execution has since issued on said judgment by the recorder. The jury further find as follows, that when the marshal levied on the house as aforesaid, a part of said house was owned by said Minor J. Winn, which part so owned by him was worth the sum of $137.50. Said house was standing on a piece of ground owned by Jeremiah Strode, who had leased it to said Minor J. Winn, with the privilege of taking off when he pleased any house he might erect thereon. Minor J. Winn had built the house in question on said lot, but had sold a part of it before the execution was levied as before stated. The jury further find that David C. Glascock was the principal in the note sued on, and that Minor J. Winn and Isham O. Winn were each securities for said Glascock."

The court rendered judgment on this verdict in favor of plaintiff for eighty dollars debt (four-fifths of the amount of the original note sued on), and assessed the damages for the detention thereof at seventy-six dollars.[1]

ute, the co-surety is, under such circumstances, not released at all. Letcher *v.* Yantis, 3 Dana, 160.

An assignee of a bankrupt surety by buying up the obligation on which the surety is liable, and declining to disclose the price paid for it, forfeits all right against the surety, and this discharge of the surety releases the co-sureties so far as their right to contribution against the discharged surety is affected. Garey *v.* Hignutt, 32 Md. 552 — ED.

[1] The arguments of counsel are omitted. — ED.

Lamb & Lakenan, for plaintiff in error.

Porter & Harrison, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

The law is well settled that a valid agreement between the creditor and the principal debtor to extend the time of payment, or any improper interference by the creditor with the process of law after the commencement of a suit, by which the surety may be injured or subjected to greater risk, or be delayed in the right on payment of the debt to proceed against the principal, if made or done without the assent of the surety, will discharge him from his liability, 24 Mo. 333; 26 Mo. 243; and the relation of principal and surety or of co-sureties is not extinguished by judgment. Rice *v.* Morton.[1] A release of the principal will discharge the surety, but one surety may be discharged, without prejudice to an action against the others, to the extent that they would be liable in a suit for contribution between themselves. Routon *v.* Lacy.[2] The creditor cannot, by discharging one, increase the liability of the other; and he will not be allowed, by discharging one, to impose on the other a greater proportion of a common burden than in equity he ought to bear. At law, if there are several sureties and one is insolvent and another pays the whole debt, he can only recover against the solvent sureties their *pro rata* part as if all of them were solvent; but the rule in equity is more just and reasonable, and the insolvent's share is apportioned among those who are solvent, 1 Story Eq. § 498. The eighth section of our statute concerning securities provides that one surety at the suit of another shall not be liable to pay more than his due proportion of the original demand, but what is his due proportion will vary according to the circumstances. Thus, if there are three sureties, and all of them are solvent, and one pays the debt, each of the others will be liable to him for one-third of the amount only; but if one of them is insolvent, the other will be liable for one-half.

In this case it seems that Glascock was the principal debtor, and that the other five parties to the note were sureties. Now if all the sureties were solvent, and the defendant paid the debt, he could only require M. J. Winn to contribute one-fifth part of it, and therefore could only ask to have one-fifth abated, and could only complain of the conduct of the plaintiff in releasing the levy of the execution to that extent. But if the other sureties are insolvent, M. J. Winn would be bound to contribute to the defendant one-half instead of one-fifth of the debt; in which case, if the plaintiff had released to M. J. Winn, he could only demand of the defendant the other moiety; and, on principle, the same result must follow if he could have made half the debt but for his improper interference with the execution. These questions cannot be determined from the meagre statement of facts in the special verdict. It does not appear whether the other sureties were solvent or not.

The statute authorizes this court to remand a cause when the facts in

[1] 19 Mo 263. [2] 17 Mo. 399.

Hodd v Winn

Π owned note on which P and 5 sureties had signed. After maturity Π sued one of these sureties, got judgment, & took out execution, but this was arrested by Π's counsel. Π now sues another surety for full amt of note, a question is as to the limit of his recovery. Lower ct gave judgment for Π for 1/5 of note

Upper ct reversed this & ordered new trial. If all sureties are solvent, each one must ultimately share equally. If some are insolvent, all the solvent ones must share equally in equity. Release of the execution against this surety releases ~~as~~ him to the extent of his liability, but it does not appear what the extent of his liability is, because number of solvent persons does not appear.

Why should release of execution discharge even this particular surety? The judgment against him still stands, & the other co-sureties can be subrogated to that judgment.

~~But principal case does not decide that~~

a special verdict are insufficiently found, 2 R. C. 1855, p. 1301, § 35; and the judgment then will be reversed and the cause remanded; Judge Napton concurring. Judge Scott not sitting.[1]

[1] Rice v. Morton, 19 Mo. 263; Lower v. Buchanan Bank, 78 Mo. 67; English v. Seibert, 49 Mo. Ap. 563, 567; Dobson v. Prather, 6 Ired. Eq. 31; Robison Bros., 14 Aust. L. T. 145; Monk v. Smith, 14 N. S. Wales R. (Eq.) 311, *Accord*.

In Story v. Johnson, 32 Ind. 438; Chipman v. Todd, 60 Me. 282; Alexander v. Byrd, 85 Va. 690, the release of an attachment or execution in a proceeding against a surety was held to have no effect whatever upon the creditor's right to proceed against a co-surety.

On the other hand, in People v. Chisholm, 8 Cal. 29, the release of an execution upon property of a surety adequate to pay the debt was held to be a complete discharge of the co-surety.

Wasting a security. If the creditor waste a security received from surety, he will release a co-surety in so far as the latter's right of contribution is prejudiced. Margretts v. Gregory, 10 W. R. 630. — Ed.

Set off by a surety, with the co-surety's consent, of a debt due to the latter from the creditor was permitted in Hibert v. Lang, 165 Pa. 439. But this doctrine is peculiar to Pennsylvania. — Ed.

SECTION XIV.

Effect of Accident, Notice of Revocation, Death of the Surety, or Default of the Principal, upon the Continuance of the Obligation of Suretyship.

UNDERWOOD *v.* STANEY.

IN CHANCERY, BEFORE SIR HARBOTTLE GRIMSTONE, M. R., NOVEMBER 24, 1666.

BEFORE LORD FINCH, C. — —

[*Reported in* 1 *Cases in Chancery*, 77.]

THE obligee in a bond of twenty years old exhibits his bill against the administrator of the principal and the surety (upon loss of his bond). The administrator saith by his answer, that he hath no assets. Upon hearing the cause, it was directed to a trial, whether the surety had sealed and delivered the bond; and a verdict had passed against the surety, viz., that he had sealed and entered into the bond. And the cause coming back to this Court, and the plaintiff's counsel praying a decree for the plaintiff's debt against the surety, Sergeant Fountain (not of counsel on either side) said it was doubtful whether equity should in this case bind the surety, who was not obliged in law, but in respect of the lien of the bond; and that being lost, and the surety having no benefit by (nor consideration for) being bound, he thought equity after so long a time should not charge the surety. The Master of the Rolls said he would see to moderate and mediate this matter between the parties, in order to which he was several times attended by the plaintiff; and the defendant making default, he decreed for the plaintiff. And afterwards the cause was upon a case made, brought before my Lord Chancellor, who was of opinion with the Master of the Rolls, and decreed it for the plaintiff.[1]

[1] Skip *v.* Huey, 3 Atk. 91; E. I. Co. *v.* Boddam, 9 Ves. 464; Hughes *v.* Nelson, 29 N. J. Eq. 547; Berg *v.* Radcliff, 6 Johns. Ch. 302, 307; Harrison *v.* Field, 2 Wash. (Va.) 140; Kerney *v.* Kerney, 6 Leigh, 484, *Accord.* In Skip *v.* Huey, *supra*, Lord Hardwicke, C., said, p. 93: "There are many cases where equity will set up debts, extinguished at law, against a surety, as well as against a principal; as where a bond is burnt or cancelled by accident or mistake, and much stronger, if a principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors."

RELIEF AGAINST SURETY ON THE GROUND OF MISTAKE. If, by mistake, the obligation signed by a surety fails to express the agreement intended by the parties, so that the surety is, at common law, either not liable at all, or only in a mode not contemplated, equity will decree a reformation of the instrument, although against a surety, and notwithstanding the Statute of Frauds. Crosby *v.* Middleton, Prec. Ch. 309; U. S. *v.* Cushman, 2 Sumn. 434; Percival *v.* McCoy, 13 Fed. R. 379; Montville *v.* Haughton, 7 Conn. 543; Olmsted *v.* Olmsted, 38 Conn. 309; Edwards *v.* Schoeneman,

It was in the debate of this case said, that if a grantee in a voluntary deed, or an obligee in a voluntary bond, lose the deed or bond, they should have remedy against the grantee or obligor in equity. *Tamen quære.* But if so, no mistake in the principal case, where the bond was for money lent; and though the surety had no advantage, yet the obligee had parted with his money, and loss is as good a consideration for a promise as benefit or profit.

ALVAH RISLEY *v.* ABNER BROWN, IMPLEADED, ETC.

IN THE COURT OF APPEALS, NEW YORK, OCTOBER, 1876.

[*Reported in* 67 *New York Reports*, 160.]

EARL, J. This is a motion for an order substituting the administrator of Abner Brown as defendant, he having died during the pendency of the appeal to this court.

The action was upon a joint promissory note made by the defendants, Abner Brown signing simply as surety. The principal interposed no defence. The action was tried before a referee, and the plaintiff recovered judgment, and judgment was entered against both defendants. Abner Brown alone appealed to the General Term of the Supreme Court, and there the judgment was affirmed. He then appealed to this court, and filed the usual undertaking providing for the payment of the judgment, if it was affirmed or the appeal dismissed. Pending the appeal he died, and an administrator has been appointed upon his estate.

The substitution ought not to be made. It is the settled law of this State that upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely dis-

104 Ill. 278; Henkleman *v.* Peterson, 154 Ill. 419 (overruling Trustees *v.* Otis, 85 Ill. 179); Keith *v.* Henkleman, 68 Ill. Ap. 623; State *v.* Frank, 51 Mo. 98; Smith *v.* Allen, Saxt. 43, Wiser *v.* Blackly. 1 Johns. Ch. 607; Berg *v.* Radcliff, 6 Johns. Ch. 302, 308; Prior *v.* Williams, 3 Abb. Ap. 624; Clute *v.* Knies, 102 N. Y. 377; Huson *v.* Pittman, 2 Hayw. 331; Armistead *v.* Bozman, 1 Ired. Eq. 117; Butler *v.* Durham, 3 Ired. Eq. 589; Sikes *v.* Truitt, 4 Jones Eq. 361; Neininger *v.* State, 50 Oh. St. 394; Moser *v.* Libenguth, 2 Rawle, 428 (*semble*); Weaver *v.* Shryock, 6 S. & R. 262, 264 (*semble*); Rutland *v.* Paige, 24 Vt. 181

In Prior *v.* Williams, *supra*, PECKHAM, J., said, p. 627: "Many cases may be conceived where the grossest injustice would result if courts had no power to correct mistakes as against sureties Mistakes are as likely to occur with them as with others, and there is no sound principle that prevents their being compelled to act justly and honestly." On page 626 the same Judge said: "With deference, I do not think it an answer to a bill for the reformation of an instrument, that it would have been invalid if not in writing, and that therefore it cannot be reformed. Upon such a doctrine, a deed of land or a mortgage could not be reformed even against a principal, because either is invalid if not in writing." — ED.

charged, both in law and equity;[1] and it makes no difference that the surety died after a joint judgment against him and the principal.[2] In the latter case, the action was upon a joint and several bond against principal and surety, and a joint judgment was recovered. The surety then died, and it was held, the obligee having treated the bond as joint by bringing an action thereon against principal and surety jointly, and the bond being merged in the judgment which was a joint obligation that his estate was discharged, both in law and equity.[3] It is, therefore, unquestioned that the judgment appealed from cannot be enforced against the estate of Abner Brown.

But the claim is made that the giving of the undertaking upon the appeal altered the position of the surety, and imposed upon him an independent liability to pay the judgment in case of its affirmance; but

[1] Rawstone *v.* Parr, 3 Russ. 539; Jones *v.* Beach, 2 D. M. & G. 886; Other *v.* Iveson, 3 Drew. 177; U. S. *v.* Price, 9 How. 92; Pickersgill *v.* Lahens, 15 Wall. 140 (affirming Fielden *v.* Lahens, 6 Blatchf. 524); Olmsted *v.* Olmsted, 38 Conn. 309 (*semble*); Dorsey *v.* Dorsey, 2 Har. & J. 480, n. (*a*); Waters *v.* Riley, 2 Har. & G. 305; Dixon *v.* Vandenburg, 35 N. J. Eq. 47, 49 (*semble*; changed now by statute); Getty *v.* Binsse, 49 N. Y. 384; Wood *v.* Fisk, 63 N. Y. 245; Hauck *v.* Craighead, 67 N. Y. 432; Randall *v.* Sackett, 77 N. Y. 480; Johnson *v.* Harvey, 84 N. Y. 363 (*semble*); Richardson *v.* Draper, 87 N. Y. 337, 344 (*semble*); Chard *v.* Hamilton, 125 N. Y. 777 (affirming s. c. 56 Hun, 259); Douglass *v.* Ferris, 138 N. Y. 192, 207 (*semble*); Raynor *v.* Laux, 28 Hun, 35; Carpenter *v.* Provoost, 2 Sandf. 537; Davis *v.* Van Buren, 6 Daly, 391; Weaver *v.* Shryock, 6 S. & R. 262; Kennedy *v.* Carpenter, 2 Whart. 344; Pecker *v.* Julius, 2 P. A. Browne, 31; Glasscock *v.* Hitchcock, 62 Tex. 143, 150 (*semble*); Boyd *v.* Bell, 69 Tex. 735, 76 Tex. 133 (*semble*); Harrison *v.* Field, 2 Wash. (Va.) 136. (Chancellor Wythe, whose decree was reversed in this case, assailed the opinion of the higher court with some severity in Wythe's Decisions, 280), *Accord.*

Shubrick *v.* Livingston, 1 DeS. 315; Lainhardt *v.* Reilly, 3 DeS. 590; Smith *v.* Martin, 4 DeS. 148; Susong *v.* Vaiden, 10 S. Ca. 247, *Contra.*

If the obligation was intended to be joint and several, and by mistake or fraud was made joint only, equity will reform the obligation, and thus prevent the exoneration of the surety's estate by his death. Olmsted *v.* Olmsted, 38 Conn. 309. (Evidence of such intention very slender.)

It was adjudged in First Bank *v.* Morgan, 73 N. Y. 593, that a creditor might come upon the estate of a surety on a joint obligation after the latter's death, if the creditor was not aware of the suretyship relation when he took the obligation. But see *contra*, Dixon *v.* Vandenburg, 35 N. J. Eq. 47, 49.

There are now statutes in most of the States which either make joint obligations joint and several, or else provide expressly that the estate of a surety on a joint obligation shall not be exonerated by his death. The following are a few of the cases decided under such statutes. Powell *v.* Kettelle, 6 Ill. 491; Anderson *v.* Armstrong, 70 Ind. 99; Mays *v.* Cockrane, 57 Tex. 352; Bergstroem *v.* State, 58 Tex. 92; Donnerberg *v.* Oppenheimer, 15 Wash. 290. — Ed.

[2] But the lien of a joint judgment fastening upon the land of all the judgment debtors, is not affected by the subsequent death of one of them, although merely a surety. Baskin *v.* Huntington, 130 N. Y. 313. — Ed.

[3] U. S. *v.* Archer, 1 Wall. Jr. 173 (*per* Grier, J., who declined to follow the contrary decision of Story, J., in U. S. *v.* Cushman, 2 Sumn. 426); McNulty *v.* Hurd, 18 Hun, 1 (*semble*), *Accord.*

But see Baskin *v* Andrews, 53 Hun, 95, 98.

On the other hand if a creditor obtained a separate judgment against a surety upon a joint (not joint and several) obligation, the subsequent death of the surety did not discharge his estate. Smith *v.* Osborne, 31 Hun, 390. — Ed.

Underwood v Stanley

D was surety on a bond in which P was obliged, which bond had been lost. P's tries to recover against D in equity. P being broke.

Ct held D liable, even tho he was surety for accommodation, & even tho 20 yrs had elapsed since making of bond.

Risley v Brown et al

P held joint promissory note signed by D's, one of them being a surety. All D's were sued jointly, & judgment was recovered below. D appealed & filed undertaking for payment of judgment in case of affirmance. Before appeal he died, & motion made to substitute his Admr.

Ct denied motion. Obligation is joint one, & in law & equity, the estate of a joint obligor dies is a surety discharged on his death. The same is true in case of a joint judgment — it then runs strictly against the survivor. Giving of undertaking makes no difference here.

the difficulty with this claim is that the judgment can never be properly affirmed. As the judgment can never be enforced against the estate of the surety, there can be no propriety in substituting his administrator. As the estate is absolutely discharged from all liability upon the judgment, we should not continue the appeal simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking. But it must be true that whatever discharges the estate of a surety in such a case from the judgment, also discharges it from the undertaking. There can be no liability upon the undertaking given, after the judgment has been destroyed or discharged, either by the act of the parties or the operation of law. It is quite inadmissible to construe the undertaking to mean that the surety would pay the judgment, even if he or his estate would, after the giving of the undertaking, be discharged from all liability upon the judgment.

The motion must be denied, without costs.

All concur. *Motion denied.*

J. W. CLARK *v.* E. C. THAYER AND ANOTHER, ADMINISTRATORS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1870.

[*Reported in* 105 *Massachusetts Reports*, 216.]

APPEAL from the decision of commissioners appointed by the probate court to receive and examine all claims of creditors against the insolvent estate of Warren Hunt, deceased, allowing the claim of James W. Clark as holder of a promissory note made by the deceased and dated May 15, 1867, for $2,000 payable five months after date to the order of Francis W. Hunt, and by him indorsed in blank.

WELLS, J. The plaintiff became the *bona fide* holder of this note, for value, before its maturity. He was informed of the previous decease of the maker, Warren Hunt. But it does not appear that he had notice of the fact that it was an accommodation note. We do not think there is any ground for the argument that he is chargeable with implied notice; or that notice may be inferred from the circumstances of the transaction. The defendants did not seek to go to the jury upon that question; and it does not appear that the point was raised at the trial. The defendants claimed that the death of Warren Hunt, known to Clark when he took the note, defeated his right to recover upon the note, or to prove it against Warren Hunt's estate. This single point being ruled against them, the case was reported, at the request of the defendants, for revision by this court.

Upon this presentation of the case, no other question is open to the defendants here, except that which was ruled upon at the trial. We

must assume that Clark was not chargeable with notice that the note was made for the accommodation of the indorsee.

Clark was entitled, then, to take the note for what it purported to be, namely, as given for value, and valid between the original parties. In that case, the death of Warren Hunt would not affect its negotiability, or its validity in the hands of any holder. Knowledge of the death of Warren Hunt, therefore, would not affect Clark with notice of any invalidity of the note. The principle is the same as that established in Monument National Bank *v.* Globe Works.[1]

The question has been argued at the bar, whether the right of Francis W. Hunt, during the life of Warren Hunt, to negotiate the note for his own use, was a power coupled with an interest, or a mere naked power revocable by Warren Hunt at any time before it was executed, and therefore revoked by his death. But we do not consider that question to be material to the decision of the case. Even if the right of Francis W. Hunt to transfer the note had been terminated by revocation of his power in any mode, and he put it into circulation fraudulently as against the maker of the note, that would only throw upon the holder the burden of proof, to show that he acquired the note before maturity, for value and in good faith. Munroe *v.* Cooper;[2] Sistermans *v.* Field;[3] Worcester County Bank *v.* Dorchester & Milton Bank;[4] Wyer *v.* Same.[5]

For some purposes, the first negotiation for value is treated as the inception of the contract. This is so especially in relation to questions of usury; and it makes no difference that the purchaser of the note supposed he was obtaining a security already in circulation, and valid between the original parties, he having no notice to the contrary. But that rule obtains under statutes, and does not apply to ordinary transactions depending on the commercial law. By that law, the indorsee of negotiable paper before maturity, for value, in good faith, and without notice of defences, is protected against defences on grounds of want of consideration, misappropriation, and even fraud between the original parties thereto. Story on Notes, § 191; Thurston *v.* McKown;[6] Lancaster Bank *v.* Taylor.[7] This rule of law meets the point of the present case. The defendants fail to establish the condition on which alone the proposed defence can be open.[8]

Judgment for the plaintiff accordingly.

[1] 101 Mass. 57. [2] 5 Pick. 412. [3] 9 Gray, 331. [4] 10 Cush. 488.
[5] 11 Cush. 51. [6] 6 Mass. 428. [7] 100 Mass. 18.

[8] Edwards *v.* McClave, 55 N. J. Eq., 151, 154–155 (*semble*); Clough *v.* Gray, 1 W. & W. (Victoria, 1862), 225, *Accord*. The rule should be the same where, although the holder knows of the accommodation nature of the bill or note, he is not aware of the death of the accommodating party. But see *contra*, Michigan Co. *v.* Leavenworth, 30 Vt. 11. If the accommodation and the death of the accommodating party are known to the holder when he takes the bill or note from the party accommodated, he cannot, according to Smith *v.* Wyckoff, 3 Sandf. Ch. 77, charge the estate of the deceased.

Similarly, it has been adjudged that one who takes a note from the party accommodated with knowledge that the party accommodating has forbidden the negotiation of the note, cannot enforce it against the latter. Agawam Bank *v.* Strever, 18 N. Y. 502, 513–14 (*semble*); Dogan *v.* Dubois, 2 Rich. Eq. 85. — Ed.

Clark v Thayer

The Hunt signed note as accomodation maker, which was negotiated to π. π knew of death of Hunt, but not of accomodation. Lower ct ruled that this constituted no defense. Suit was against Hunt's Admrs.

ct sustained lower ct. π could take note being a B.F.P., & death of maker would not affect the negotiability of note, even if known to π.

LLOYD'S *v.* HARPER.

IN THE COURT OF APPEAL, NOVEMBER 15, 1880.

[*Reported in* 16 *Chancery Division*, 290.]

JAMES, L. J.[1] The facts of the case are these. A gentleman of the name of Harper was minded to be introduced as what was called an underwriting member of Lloyd's Association, and in accordance with the custom which had been introduced some years before, and was in existence at that time, the committee before they admitted him to that position required a guarantee. His father, who was at that time I believe himself an underwriting member of Lloyd's, gave the guarantee to the committee in the following words: "My son Robert Henry Harper, being a candidate for admission to Lloyd's as an underwriting member, I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity."

The first question which was raised on this appeal was, that upon the construction of that guarantee it did not extend to any liability under which the son might come to the outside world, but was confined to engagements which he might be under to indemnify the society itself, *i. e.*, to what might be called internal engagements. It appears to us to be impossible to put that construction on the guarantee. The words are "engagements in that capacity." In what capacity? In the capacity of an underwriting member. As it seems to me, neither the committee nor Mr. Harper, the father, who gave the guarantee, nor the son could at the time doubt that what were meant to be guaranteed were the engagements the son might enter into as underwriter with the outside world, so as to prevent any default which would have redounded to the injury and discredit of the association, and it is clear to my mind that such is the true construction of the guarantee.

That being so, is there any limit to the guarantee? It was contended that it was limited to the lifetime of the guarantor. It appears to me impossible to say that it was so limited. It applies in terms to "all engagements in that capacity." Whether the engagements were entered into before or after the death of the father, it appears to me utterly impossible to say they were not engagements entered into by the son in the capacity of an underwriting member. The representatives of Mr. Harper are bound by Mr. Harper's guarantee, just as if he had entered into a covenant to indemnify a lessor against the breach by the lessee of the covenants of a lease.[2] In order to support the contention that the guarantee was *ipso facto* determined at the death of the guarantor, it was contended that the guarantor could himself in his lifetime have

[1] Everything is omitted except the opinion of JAMES, L. J., upon the limit to the guarantee. COTTON and LUSH, JJ., delivered concurring opinions. — ED.

[2] As in Holthausen *v.* Kells, 18 N. Y. Ap. Div. 80; Coe *v.* Vogdes, 71 Pa. 383; Pleasanton's App., 75 Pa. 344, 9 Phila. 302 (*semble*). — ED.

revoked the guarantee, and that therefore it must be assumed that his death would operate in the same manner, that is to say, it is said we must assume that the executors, as it was their duty to do, have revoked the guarantee, and that matters are to be on the same footing as if the testator had exercised the option to determine it. Now the foundation of that contention appears to me utterly to fail. The testator, in my opinion, could not have determined the guarantee, and in that respect the case differs essentially from the case of Coulthart *v.* Clementson, in which Mr. Justice BOWEN followed the decision in Harris *v.* Fawcett,[1] with regard to the effect of death in determining a guarantee. In those cases there is this distinction (whether it is sufficient to sustain them or not), that each advance of goods was a separate consideration. It may be considered equitable and right that where a man is not under any obligation to make further advances or to sell further goods, a person who has guaranteed repayment of such advances, or payment of the price of the goods, may say, "Do not sell any further goods or make any further advances; I give you warning that you are not to rely upon my guarantee for any further advances which you make, or for any further goods you sell." That might be in many cases a very equitable view. It perhaps might be hardly equitable for a banker or merchant to go on making advances after receiving a distinct notice from the guarantor that he would not be further liable. But here the consideration is given once for all, just as in the case of the granting a lease in which a third party guarantees the payment of the rent and the performance of the covenants. The father undertakes that if the son is admitted to the *status* of an underwriting member, he, the father, will guarantee all the son's engagements as such member. The moment the son was admitted to that *status* he became entitled to retain it until he had done some act which under the rules deprived him of his right to retain it. If the testator could at any time have determined the guarantee, he could have determined it the next day. The moment the son was admitted to the *status* of an underwriting member with all its privileges, if the father was at liberty to say, "I withdraw the guarantee," then the guarantee would have been utterly futile and idle. If it could not be determined by him the next day, there would be no time at which he could have a power of determining it. That being so, it appears to me that his estate is still liable for all the engagements which the son entered into with the persons who effected policies of insurance with him. *Judgment for the plaintiff affirmed.*[2]

[1] Law Rep. 15 Eq. 311; Ibid. 8 Ch. 866.

[2] McCloskey *v.* Barr, 79 Fed. R. 408, 415 (*semble*); Kernochan *v.* Murray, 111 N. Y. 306, 309 (*semble*), *Accord.*

Similarly, the death of a surety in a fidelity bond does not exonerate his estate as to subsequent defaults of the principal, where the latter was to hold his position for a definite time, or until the accomplishment of the object of his appointment. Broome *v.* U. S., 15 How. 143 (Collector); Moore *v.* Wallis, 18 Ala. 458 (Guardian); Hightower *v.* Moore, 46 Ala. 387 (Administrator); Voris *v.* State, 47 Ind. 345 (Guardian); Mow-

Lloyds v Harper

One Harper was about to be admitted to Lloyds. They required a guarantee, so a note it that he guaranteed all engagements of his son. Guarantor then died, & suit is against his executors. D contended that guarantee could have been revoked at any time, & that death of guarantor must be considered as revocation.

Ct gave judgment for P. Guarantee was not revocable, but lasted as long as son was an underwriter, just so long guarantor, or his ex's remained liable. Testator could not have determined the guarantee, & neither could his ex's.

Pier v Ladd Admstrx

D's testator was surety on a bond given for faithful performance by S. Ladd as deputy sheff x S. Ladd defaulted, & suit is for damages occuring before & after decease of D's testator.

ct gave judgment for P. D signed the guaranty for so long as Ladd should hold office, & must be held for so long, whether he dies or not x

JAMES CARR *v.* ABIGAIL LADD, ADMINISTRATRIX.

IN THE SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, SEPTEMBER, 1803.

[*Reported in Smith*, 45.]

THIS was debt on a bond made by Nathaniel Ladd, A. B., and Samuel Ladd. The bond was joint and several. The condition recited that the plaintiff had appointed Nathaniel Ladd, one of the obligors, to be a deputy sheriff under him (without any limitation of time). There were the usual stipulations: that he should faithfully execute the office, indemnify the sheriff, and pay over a certain proportion of the fees.

The defendant was defaulted, and prayed to be heard in chancery.

On the hearing the plaintiff claimed damages for a default of Nathaniel Ladd, which happened after the death of Samuel Ladd, the defendant's intestate.

This claim was resisted, on the ground that the estate of the intestate was only liable for defaults which happened before his death.[1]

To this it was answered, and resolved by THE COURT, that this was not such an engagement as must necessarily be performed by the deceased in his lifetime, and could not be performed by executors or administrators.

The case of Heaver *v.* Thompson, King's Bench, June 25, 1803, before Lord Ellenborough, is in point.

"This was an action against an executor on a bond for £100, given as security for the honesty of one Cooper, who was employed as bookkeeper at the Angle Inn, on the recommendation of the defendant's testator [James Marsh, who executed this bond].

"[Mr. *Erskine* stated that he could prove defalcations in Cooper's account to an amount considerably greater.]

"Mr. *Park* [on the other side] stated that the defalcations of Cooper were after the death of Marsh, the defendant's testator. He admitted that the executors were bound to answer any defalcations in the lifetime of Marsh, but he thought it would be extremely hard that a man's family should be bound for an indefinite time by a bond given merely as a security for the honesty of the person recommended. The learned counsel cited some authorities, which he conceived were against this supposition.

"Lord Ellenborough said that, whether it was a hardship or not, it was certainly the law, that, if a man gave a bond as a security for the good behavior or good conduct of any individual in any office, this bond was binding on his executors as long as he continued in that

bray *v.* State, 88 Ind. 324 (City Treasurer); Wood *v.* Leland, 1 Met. 387 (Guardian); White *v.* Commonwealth, 39 Pa. 167 (Trustee); Shackamaxon Bank *v.* Yard, 143 Pa. 129, 150 Pa. 351 (Cashier); Snyder *v.* State, 5 Wyo. 318 (Clerk of Court). — ED.

[1] The report of the case is somewhat abridged. — ED.

office. He had himself known a similar bond of £10,000 paid by executors, though the bond was executed twenty years ago.

"Mr. *Park* said he wished this might be generally known, as it would make men a little more cautious in entering into such securities.

"The verdict was [then] given for the plaintiff [subject to a reference on the accounts]." [1]

Securities given by executors, administrators, and guardians, in this State, must all stand upon the same footing with the present; and it never was doubted that the estates of the bondsmen were liable, though the waste was committed after their death.

The proper remedy against the mischiefs that have been suggested by the counsel for the defendant would be for the sureties to stipulate only for a certain time; or to introduce a stipulation that, on notice by the surety that he would no longer be holden, the responsibility should terminate. If no such covenants are inserted, and the covenantors oblige themselves as long as the deputy remains in office, it must depend on the pleasure of the sheriff how long they shall be bound. Arguments from inconvenience have no place where the law is clear. The administrator must answer for defaults till the deputation given to Nathaniel Ladd was revoked.[2]

Judgment for amount of penalty of the bond. Execution for damages, $957.20, *and costs.*[3]

[1] See Boston Gazette, Sept. 1, 1803.*

[2] Sureties in a recognizance to keep the peace, it is said, are not discharged by their death; their executors or administrators continue bound. 4 Burn, 268, 269; 1 Hawk. P. C. 129; Dalt. c. 120; 1 Hawk. P. C. b. 1, c. 60, § 17, p. 258.

[3] Gordon *v.* Calvert, 2 Sim. 253, 4 Russ. 581, 3 M. & Ry. 124 (collecting clerk); McCloskey *v.* Barr, 79 Fed. R. 408, 415–16 (*semble*); Rapp *v.* Phœnix Co., 113 Ill. 390 (insurance agent); Royal Co. *v.* Davies, 40 Iowa, 469 (insurance agent); Green *v.* Young, 8 Me. 14 (deputy-sheriff); Shackamaxon Bank *v.* Yard, 143 Pa. 129, 150 Pa. 351 (cashier); in which cases the principal obligor held his position at the will of his employer, the obligee, *Accord.* To the same effect are Andrus *v.* Beals, 9 Cow. 693 (deputy-sheriff); Barnard *v.* Darling, 11 Wend. 28 (deputy-sheriff); in which cases the surety sought to terminate his liability for the future by a notice to that effect.

But a different doctrine is suggested in Reilly *v.* Dodge, 131 N. Y. 153, 157: "There are certain contracts of indemnity which may be terminated by a surety without the consent of the creditor or the principal. It was said by FINCH, J., in Emery *v.* Baltz (94 N. Y. 408), that 'a surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may revoke and end his future liability in either of two cases, viz.: First, where the guaranteed contract has no definite time to run; and second, where the principal has so violated the contract, and is so in default, that the creditor may safely and lawfully terminate it for that reason.' The learned judge did not say, nor does the case hold, that the liability may be terminated by mere notice given by the surety at any time, and is not authority to sustain the proposition upon which the sureties in this case rely; namely, that their liability was terminated on the twenty-eighth of November, the day the notice was received.

"Whether a surety upon a penal bond, conditioned upon the faithful performance of

* Annexed to the manuscript is a printed slip, which seems to have been cut from the "Boston Gazette," containing a report of Heaver *v.* Thompson, substantially the same as recited in the opinion.

FEWLASS AND OTHERS v. KEESHAN AND OTHERS.

IN THE CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, JULY 5, 1898.

[*Reported in* 88 *Federal Reporter*, 573.]

BEFORE TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. This is an appeal from the decree of the Circuit Court against Howard Ferris, the administrator of Samuel Cooper, deceased, and Hannah Cooper Fewlass, his sole heir and next of kin, on a cost bond entered into by Cooper shortly before he died for the amount of the costs adjudged to be due from the complainants in the case, most of which accrued after Cooper's decease. The bond was in the form following: —

"In the Circuit Court of the United States for the Southern District of Ohio.
"Sarah E. McCloskey *et al. v.* Samuel Barr *et al.* Cost bond.
"I hereby acknowledge myself security for costs in this case.
"SAMUEL COOPER.
"Taken and acknowledged before me this 15th day of September, 1887.
"ROBERT C. GEORGI,
"Deputy Clerk United States Circuit Court, Southern District of Ohio."

After a decree for costs was rendered against complainants in the action, the administrator and the heir and next of kin of Cooper were duly notified of the filing of a petition by the successful parties for a decree against them, and, after pleadings were filed raising various issues, evidence was taken, and the decree for the full amount of costs, now appealed from, was entered.

his duty, by a public officer like a deputy sheriff, can terminate his liability without the consent of the sheriff or the principal in the bond, or can become discharged without any new consideration, is a point that is not necessary to decide in this case. It is entirely safe to hold, however, that a notice by the surety, such as was served in this case, does not operate to discharge the sureties until a reasonable time has elapsed sufficient to enable the sheriff to give notice to the deputy and the other sureties, and to permit a new bond to be given.* The official duties of the sheriff are performed to a very great extent through deputies appointed by him, and, for his own protection, they are required upon their appointment to give bonds to him for the faithful performance of their duties. It would greatly embarrass the sheriff in the performance of the important and responsible duties of his office if the sureties upon the bonds of his deputies could withdraw from them and terminate their liability at will. The business in the hands of the deputies might be in such a condition when the notice of the sureties is served upon him that he might be unable to arrest their action or terminate their power to subject him to liability by their acts done in his name. Unless the sureties can be held by him to the liability which they assumed for at least a reasonable time after the notice, he may be subjected to liability of the gravest kind for the acts of others without any means of protection. That this responsibility cannot be thrown upon the sheriff by the sureties at will and upon notice merely, would seem to be clear upon principle, and is sustained by abundant authority. — ED.

* La Rose *v.* Logansport Bank, 102 Ind. 332, 344 (*semble*), *Accord.*

The first [1] point made in this court by the appellants is that the cost bond does not bind the estate of the surety for any costs accruing after his death. The rule as to the obligation of a grantor in respect to transactions occurring after his death is that the obligation is not affected by his death if the contract of guarantee was one from which he might not withdraw upon notice, but that, if he could have done so, then his death will be given the effect of a notice of withdrawal, at least from the time when the knowledge of the same has been brought home to the obligee. The former proposition is sustained by the cases of Lloyd *v.* Harper; Calvert *v.* Gordon;[2] Green *v.* Young;[3] Moore *v.* Wallis;[4] and Voris *v.* State.[5] The alternative proposition is illustrated in the cases of Jordan *v.* Dobbins; Hyland *v.* Habich;[6] Coulthart *v.* Clementson; and Gay *v.* Ward.[7] A court cannot release a surety upon a cost bond without the consent of the party for whose benefit the security has been given. Holder *v.* Jones;[8] Standard Publishing Co. *v.* Bartlett.[9] This feature of the obligation of a cost bond places it in the category of irrevocable guarantees, the obligations of which continue according to their terms, without regard to the death of the guarantor.[10]

BRADBURY AND OTHERS *v.* MORGAN AND ANOTHER, EXECUTORS.

IN THE EXCHEQUER, JUNE 4, 1862.

[*Reported in* 1 *Hurlstone & Coltman*, 249.]

DECLARATION. That heretofore, and in the lifetime of the said J. M. Leigh, the said J. M. Leigh contracted, guaranteed, and agreed with the plaintiffs, in the guarantee hereinafter mentioned called Messrs. Bradbury, Greatorex and Co., in the words and figures following, that is to say: —

"3 GEORGE YARD, LOMBARD ST.,
"LONDON, May 3, 1858.

"Messrs. Bradbury, Greatorex and Co.

"Gentlemen,

"I request that you will give credit in the usual way of your business to Henry Jones Leigh, of Leather Lane, Holborn; and in consideration of your doing so, I hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of one hundred pounds sterling.

"I remain, &c.,

"Limit £100. "J. M. LEIGH."

[1] Only so much of the case is given as relates to this point. — ED.

[2] 3 Man. & R. 124. [3] 8 Me. 14. [4] 18 Ala. 458.
[5] 47 Ind. 345. [6] 150 Mass. 112. [7] 67 Conn. 147.
[8] 29 N. C. 191. [9] 5 Wkly. Law Bul. 501.
[10] McCloskey *v.* Barr, 79 Fed. R. 408, *Accord.* — ED.

Fewlass v Keeshan et al.

In a certain suit, Cooke entered into a bond for securing the costs of an appeal, as surety & died shortly after, & now suit is against his estate for costs.

Ct gave judgment for Π & surety here could not have withdrawn upon notice, because a Ct cant release a Cost surety without consent of the other party to the suit, since it is irrevocable, & obligations of bond continues notwithstanding death of principal.

Brandbury v Morgan Exch

D requested Pl to give credit to a certain person to the extent of £100, guaranteeing the half of the running balance "until D give you notice to the contrary". declaration was on this guarantee. Plea that goods sued for were delivered & sold after death of testator. It appeared that Pl did not know of death at time he supplied goods. demurrer to plea.

It was held by the court that [illegible] judgment for Pl. This is a contract here, & where a person promises for himself, he must be held to include his ex'rs etc. Hence the contract is not put an end to by the death, & Pl can recover.

Notice nothing is said in opinion as to effect of notice of death, so it would seem that result would be the same whether P knew or not.

dictum that ex'rs could give notice which would put an end to the contract.

But is not this an offer (continuing), which is accepted by each giving of credit, & hence would be revoked on death of offeror? It seemed to think that it was a contract. But it might be unilateral contract, the giving of credit being the consideration for the promise to guarantee.

And the plaintiffs accordingly from time to time credited the said H. J. Leigh in the usual way of their business; and the running balance of the said H. J. Leigh's account with the plaintiffs afterwards, and after the death of the said J. M. Leigh, and before the plaintiffs had any notice or knowledge of such death, and before any such notice as in the said guarantee was and is made and provided had been given to the plaintiffs amounted to a large sum, to wit, £100, and was and is due and unpaid to the plaintiffs; and all things have been done and happened, and all times have elapsed, necessary to entitle the plaintiffs to maintain this action.

Plea. — That the said running balance of the said H. J. Leigh's account was and is due to the plaintiffs for goods sold and delivered by them, and credits for the same given by them in the usual way of their business, to the said H. J. Leigh, and not otherwise; and that the said goods were sold and delivered, and the credits in respect thereof given, and the debts constituting the said balance of the said account were, and each of them was, contracted and incurred after the death of the said J. M. Leigh, and not in his lifetime.

Demurrer and joinder therein.

Beresford (with whom was *Hume Williams*) in support of the demurrer.

J. Brown, in support of the plea.[1]

POLLOCK, C. B. We are all of opinion that the plaintiff is entitled to judgment. No doubt, if this were merely an implied contract which arose from a request, it would be revoked by the death of either party. Blades *v.* Free[2] is an authority that a request is revoked, but a contract is not put an end to, by death. The language here used, "I request you will give credit," is a mere mode of civil expression, and the party using it never meant to request in that sense which Mr. Brown has suggested. Instead of saying, "I will thank you to give credit;" or "You will oblige me by giving credit," he says, "I request you will give credit." Whether his death was contemplated, I do not know. The probability is, that if it had been suggested the plaintiffs would have required some notice before the guarantee was determined; but this is a contract, and the question is whether it is put an end to by the death of the guarantor. There is no direct authority to that effect; and I think that all reason and authority, such as there is, are against that proposition, and that the plaintiffs are therefore entitled to judgment.

BRAMWELL, B. I am of the same opinion. The general rule is thus stated in Williams on Executors, page 1559, 5th ed.: "The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it; for the executors or administrators of every person are implied in himself." The only exception is where the contract is in respect of the *personal* qualification of the testator or

[1] The arguments of counsel are omitted. — ED.

[2] 9 B. & C. 167.

intestate, and that does not apply to the present case. If the guarantee had been in these terms: "I request you to deliver to A. to-morrow morning goods of the value of £50, and in consideration of your so doing I will pay you," and before the morning the guarantor died, but the goods were duly delivered; I can see no reason why the personal representative of the guarantor should not be liable; and whether a guarantor says, "deliver some goods on a given day," or "deliver a quantity of goods upon any day or days," can make no difference. Very likely a tradesman, who would not trust in the first instance without a guarantee, would not deliver any goods after the death of the guarantor, but, however that may be, the executor must give some timely notice in order to put an end to the contract. Mr. Brown relied on the words "I request you will give credit," but they are of no importance; for this is not a case of authority given by the deceased.

With respect to the passage in Williams on Executors, p. 1604, it is certainly not supported by any authority. It is there said, if a man enters into a continuing guarantee and dies, his executor, *it seems*, is not liable for advances made after the testator's death, which operates as a revocation. Reference is made to Smith's Mercantile Law, p. 451, 5th ed., but not to the authorities there cited; and if those authorities be looked at, there is no pretence for saying that they justify the proposition laid down in that book. Therefore it seems to me that there is no authority to prevent us from deciding in favor of the plaintiff.

CHANNELL, B. I am also of opinion that the plaintiff is entitled to judgment. Whether the parties contemplated that the contract should extend beyond the life of the guarantor, is not the question. I agree with the Lord Chief Baron that the question is whether this is a case of mere authority or a contract. I am of opinion that it is a contract, and if so, it is not revoked by the death of the guarantor. A mere authority is determined by death, but in the case of a contract death does not in general operate as revocation, but only in exceptional cases, and this is not within them.

Judgment for the plaintiffs.[1]

[1] Illinois Co. v. Gorton, 19 Pa. Co. R. 124, 6 Pa. D. C. 447 s. c.; Michigan Bank v. Leavenworth, 28 Vt. 210, *Contra*.

In Offord v. Davies, 12 C. B. N. S. 748, and Conduitt v. Ryan, 3 Indiana Ap. 1, a promise similar to that in the principal case was held to be without legal effect from the time notice of revocation of the offer was given to the offeree. But if the plaintiff, acting in reliance upon the defendant's letter of credit, has promised to honor bills to be drawn upon him by A, he may exact reimbursement from the defendant for acceptances of A's bills although made after notice from the defendant of the revocation of his letter of credit, if the bills accepted were drawn before the plaintiff had time to notify A to draw no more bills upon him. Gelpcke v. Quentell, 74 N. Y. 599. — ED.

COULTHART *v.* CLEMENTSON AND ANOTHER.

IN THE QUEEN'S BENCH DIVISION, DECEMBER 9, 1879.

[*Reported in* 5 *Queen's Bench Division*, 42.]

THE following judgment was delivered: —

BOWEN, J. This is an action brought by a bank upon a continuing guarantee against the executor of a deceased guarantor.

Messrs. E. & J. Clementson, cotton-brokers and spinners in the county of Chester, had a banking account with the bank of which the plaintiff is the registered public officer. In the year 1867 the bank required security for the advances which were likely to be made to Messrs. E. & J. Clementson, and on the 24th of August, 1867, a written guarantee was executed by Nathaniel Lawton, the deceased, and the defendant Joseph M. Clementson, who is now Nathaniel Lawton's executor (and sued as such).

The material part of the guarantee is as follows: —

"We the undersigned, Joseph Moxom Clementson, of Dukinfield, in the county of Chester, cotton-spinner, and Nathaniel Lawton, of Micklehurst, flannel manufacturer, do hereby jointly and severally undertake and agree to guarantee to the proprietors of or partners in the said banking co-partnership for the time being the due and punctual payment when required of all such sums of money as may have been, or may be from time to time, advanced or paid by or from the said banking co-partnership, or which the same co-partnership may have already paid, or become liable to pay, or may hereafter pay or become liable to pay for or on account of the said Edward and John Clementson, or their order, on any account whatsoever, with interest, commission, and other banking charges upon such sums. . . . And we jointly and severally further agree as follows, namely, that this guarantee or engagement shall be considered a continuing guarantee, and shall *not* be withdrawn, but shall continue in full force until three months after notice to the manager of the said banking co-partnership in Ashton-under-Lyne in writing under our hands of our intention to discontinue or determine the same."

Advances were duly made by the bank under this guarantee down to the death of the testator, Nathaniel Lawton, on the 19th of December, 1875, at which date the firm of Messrs. E. & J. Clementson were considerably indebted to the bank. It was admitted, however, that sufficient sums of money after notice of the death had been paid into the account, and generally appropriated to the current account, to cover any balance which was in fact owing at the date either of the death or of such notice. Upon the other hand, if the guarantee was not determined in law by death or notice of the death of the testator, it was admitted that the bank, who continued their advances up to May, 1878, to the firm of E. & J. Clementson, were entitled to recover under this

guarantee a large sum of £3,000 or thereabouts, which, in case of difference, is to be settled hereafter by a referee.

The cause was tried before myself and a special jury at Liverpool, when it was agreed that the jury should be discharged, and that the court should have power to draw all reasonable inferences of fact.

The evidence as to what had passed between the bank and the defendant as Nathaniel Lawton's executor after Nathaniel Lawton's death is not very clear. From a feeling of mutual courtesy the parties refrained from cross-examination of one another at the trial.

It appeared that the bank knew of the death of Mr. Lawton, but had received no written notice of it addressed specially to themselves. On the 12th of February, 1876, however, the defendant as executor had published in the proper newspapers advertisements under 22 & 23 Vict. c. 35, requiring the creditors of the deceased Nathaniel Lawton to send in particulars of claims to the solicitors of the executors on or before the 14th of May, 1876. The bank and their officers were cognizant of this advertisement, as well as of Nathaniel Lawton's death.

Under the testator's will one-third of his estate was to be in trust for the children of the testator's sister Sarah who should attain twenty-one years in equal shares, one-third for the children of his deceased brother John Lawton who should attain twenty-one, and the remaining one-third to the brother of the testator, M. H. Lawton. Some of the children were minors. M. H. Lawton, before any claim made by the bank, got his share and spent it.

It was admitted that the bank knew who were the executors, and that, without knowing the terms of the will, the bank knew that the estate was going, one-third of it to the testator's brother, and two-thirds to the children of the testator's brother and sister, some of whom were infants.

The defendant, who was a brother of the partners in the guaranteed firm, Messrs. E. & J. Clementson, had become liable to the bank as a guarantor jointly and severally with Nathaniel Lawton under the guarantee in question. He called at the bank shortly after the appearance of the advertisements, and saw the manager, Mr. Coulthart. The following is the account given by the defendant of the interview: "I went to the bank to see if they could advance some money on a large public building, the Conservative Hall, and Mr. Coulthart agreed to do so. Then he said, 'I see by the notice in the paper that your brother-in-law is dead. Do you know that you are responsible for £3,000?' and I was not aware of it, but was quite agreeable to be so, knowing my brother to be in good circumstances. He asked me how they were doing. I told him I knew all their affairs, and told him they were doing as well as they could be doing at the time. That is all that passed to the best of my recollection. We should never have paid the share out if we had thought it was subject to liability."

The defendant was not cross-examined, but it was stated on behalf of the bank that Mr. Coulthart's recollection of the conversation differed

Coulthart v Clementson et al

A gave a guarantee along with one Lawton for indebtedness of a firm, which was to apply to all past advances, and all future advances, & was only to be terminated on three months notice in writing x Lawton died, & A was also his ex'r. Bank knew of death, & that there was a will, but no notice was given Bk x Subsequent advances were made, & firm went broke x suit is to recover subsequent advances x

It held that there could be no recovery x notice of death, along with notice that there is a will is enough to put Bk on inquiry to find whether there is authority given by will to continue the guaranty x 3 mos notice can only apply to notices during lifetime of surety x Ex'r cannot continue guarantee by himself, & hence death alone must be sufficient to discontinue guaranty, if not home to it x

dictum that parties may provide that a special notice after death of guarantor may be required x

from the defendant's, and by consent a written memorandum of the interview made by Mr. Coulthart at the time was put in as containing the substance of the evidence which Mr. Coulthart was prepared to give, and was to be taken as if he had actually deposed to it.

The memorandum was as follows: —

"Mr. Clementson called, and said he would sign a new letter of guarantee for £4,000 or allow the existing ones to continue, as might be most agreeable to the directors."

In May, 1878, the guarantee firm, Messrs. E. & J. Clementson, fell, as I have stated, into difficulties. The bank to whom they were indebted heavily for advances, exceeding the amount of the guarantee, claimed under the guarantee to be repaid the same by the defendant as executor of the testator, and brought this action.

For the defendant it was contended that the testator's estate was not liable for any advances made after the testator's death, or, at all events, after the bank received notice of his death. For the bank it was argued that no notice was given which was equivalent to a notice of the withdrawal of the guarantee, and that the proper inference to be drawn from these facts was that the bank had a right to and did still suppose that the guarantee was to continue.

If it were established that, after the death of the testator the parties had dealt together on the footing that the guarantee was at an end, the case of Harris *v.* Fawcett[1] would apply, and the bank would not be liable. But I do not decide this case on that ground, though I am not convinced, on the present materials alone, that the bank [defendants?] may not, after the testator's death, have been looking to the defendant's liability as joint and several guarantor on the guarantee, and have considered the guarantee determined as regards the testator and his estate.

It is possible, on the other hand, that the executor himself supposed the guarantee to be at an end, while the bank entertained no definite opinion on the subject. It would be difficult for me to express any clear view about the matter, as the evidence leaves me still in some doubt about it. It is not necessary, if my judgment be well founded, to decide the point.

I am of opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned, of the guarantee. A guarantee like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantor. It is a contract, and the question from what time and on what notice it ceases to cover advances is a question of construction of the contract itself. In the case of such continuing guarantees as the present, it has long been understood that they are liable, in the absence of anything in the guarantee to the contrary, to be withdrawn on notice. Various explanations have been offered of this reasonable, though im

[1] Law Rep. 15 Eq. 311; 8 Ch. 866.

plied, limitation. The guarantee, it has been said, is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made. This explanation has received the sanction of the Court of Common Pleas in the case of Offord v. Davies.[1] Whether the explanation be the true one or not, it is now established by authority that such continuing guarantees can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guarantee irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's estate a limitation which is read into it to protect him while he is alive. On the argument of the present case it was virtually conceded that the provision as to three months' notice relating only to the guarantor's life, and there being no corresponding provision as to the notice to be given on his death, the guarantee could be legally determined at any time after the guarantor's death by a proper notice to that effect. But there remains the question what is the proper notice to be given. To answer this question we must consider the change which the guarantor's death has effected in the situation. The notice cannot any longer be given by the guarantor. He is dead. The executor of his will is guardian of his estate, and if notice is to be given by any one, the executor would seem the person to give it. But must the executor give special notice that the guarantee is withdrawn; or is it not enough that the bank should be warned of the death of the testator and the devolution of his estate to others? In many cases the executor has no option to elect to continue the guarantee. Surely it would in such cases be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue. Notice of the death and of the existence of a will is notice of the existence of trusts which may be incompatible with the continuance of the guarantee. If, indeed, under the testator's will, the executor has the option of continuing the guarantee, then from the absence of any specific notice of withdrawal, the bank may, perhaps, in spite of notice of the death, properly assume, as against the estate, that the guarantee is not to be determined. But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guarantee by notice cannot any longer be a giver of notices; that his estate has passed to others who have trusts to fulfil, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guarantee, then the bank has constructive notice that the guarantee is withdrawn. If, indeed, the contracting parties desire that on the death of the guarantor a special notice

[1] 12 C. B. (N. S.) 748; 31 L. J. (N. S.) (C. P.), 319.

shall be necessary to determine the guarantee, they can so provide in the guarantee itself; and such a provision will, of course, bind the estate.[1] Here there is no such provision.

Judgment will, therefore, be entered for the defendants, with costs.

Judgment for the defendants.[2]

E. D. JORDAN AND OTHERS *v.* E. DOBBINS, ADMINISTRATRIX.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 1, 1877.

[*Reported in* 122 *Massachusetts Reports*, 168.]

CONTRACT upon the following guarantee: "For value received, the receipt whereof is hereby acknowledged, the undersigned does hereby guarantee to Jordan, Marsh & Co. the prompt payment by George E. Moore to Jordan, Marsh & Co., at maturity, of all sums of money and debts which he may hereafter owe Jordan, Marsh & Co. for merchandise, which they may from time to time sell to him, whether such debts be on book account, by note, draft, or otherwise, and also any and all renewals of any such debt. The undersigned shall not be compelled to pay on this guarantee a sum exceeding $1,000, but this guarantee shall be a continuing guarantee, and apply to and be available to said Jordan, Marsh & Co., for all sales of merchandise they may make to said George E. Moore until written notice shall have been given by the undersigned to said Jordan, Marsh & Co. and received by them, that it shall not apply to future purchases. Notice of the acceptance of this guarantee and of sales under the same, and demand upon said George E. Moore for payment, and notice to me of non-payment, is hereby waived. In witness whereof I, the undersigned, have hereunto set my hand and

[1] In *In re* Silvester, '95, 1 Ch. 573, the parties did so provide, and it was accordingly adjudged that the estate of a deceased surety continued liable on a bond to secure the repayment of successive advances, although the advances were made after knowledge of the surety's death. ROMER, J., said, p. 576: "I think that on such a contract as this the plaintiffs were entitled to rely on the express provisions of the contract with them, and were not bound to take the notice of the obligor's death as a notice from his executors to determine the liability. The proviso freed the plaintiffs from being bound by any implied notice of or being bound to make inquiry as to whether there would be any breach of trust on the part of the executors in not giving notice to determine the liability." See also Hecht *v.* Weaver, 34 Fed. R. 111. — ED.

[2] Harris *v.* Fawcett, 15 Eq. 311, 8 Ch. 866 (*semble*); *In re* Whelan, '97, Ir. 1 Ch. 575; Menard *v.* Scudder, 7 La. An. 385, *Accord.*

In Lloyds *v.* Harper, 16 Ch. Div. 290, LUSH, L. J., said, p. 320: "I cannot entertain a doubt that the judgment of Mr. Justice Bowen in Coulthart *v.* Clementson is perfectly right, that notice of the death of the guarantor is a notice to terminate the guarantee, and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it." But in the same case COTTON, L. J., said, p. 318: "It may in such a case be, although I give no opinion upon it, that death and notice of death are sufficient to determine a guarantee as regards subsequent advances." — ED.

seal this twenty-eighth day of February, A. D. 1873. William Dobbins. (Seal.)" Annexed to the declaration was an account of goods sold to Moore.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, on an agreed statement of facts in substance as follows: —

The plaintiffs are partners under the firm name of Jordan, Marsh & Co., and the defendant is the duly appointed administratrix of the estate of William Dobbins.

William Dobbins, on February 28, 1873, executed and delivered to the plaintiffs the above written contract of guarantee. The plaintiffs thereafter, relying on this contract, sold to said Moore the goods mentioned in the account annexed to the declaration, at the times and for the prices given in said account, all of the goods having been sold and delivered to Moore between January 16 and May 28, 1874. All the amounts claimed were due from Moore, and payment was duly demanded of him and of the defendant before the date of the writ. Other goods had been sold by the plaintiffs to Moore between the date of the guarantee and the first date mentioned in the account, but these had been paid for.

William Dobbins died on August 6th, 1873, and the defendant was appointed administratrix of his estate on September 2, 1873. The plaintiffs had no notice of his death until after the last of the goods mentioned in the account had been sold to Moore.

If upon these facts the defendant was liable, judgment was to be entered for the plaintiffs for the amount claimed; otherwise, judgment for the defendant.

M. Storey, for the plaintiffs.

D. S. Richardson & G. F. Richardson, for the defendant.

MORTON, J. An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guarantee is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guarantee is not that I now become liable to you for anything, but that if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guarantee is revocable by the guarantor at any time before it is acted upon.

In Offord v. Davies,[1] the guarantee was of the due payment for the space of twelve months of bills to be discounted, and the court held

[1] 12 C. B. (N. S.) 748.

Jordan v Robbins

A made a guarantee under seal of all future sales to one ~~Wood~~ Moore; written notice of withdrawal of guarantee was to be given. surety died & then goods were sold by D's who had no notice of death of surety & suit was to recover value of goods sold

Ct gave judgment for A. Guarantee is an offer here to become liable as goods are sold. & fact that it is under seal makes no difference. Since only an offer death revokes it, whether known to creditor, or not.

Case would seem wrong because instrument is under seal, & hence there is a binding contract at the start, & death won't revoke it; liability there is contingent.

that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal which might be revoked at any time before it was acted on.

Such being the nature of a guarantee, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke.

Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guarantee is carefully drawn, but it is in its nature nothing more than a simple guarantee for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterwards.

We are not impressed by the plaintiffs' argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

The decision in Bradbury *v.* Morgan, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory and inconsistent with the opinion of the same court a year before, in Westhead *v.* Sproson,[1] and with the decision in Offord *v.* Davies, *ubi supra*, at the argument of which Bradbury *v.* Morgan was cited; and it has not since been treated as settling the law in England. Harris *v.* Fawcett.[2] The reasons of the similar decision in Bank of South Carolina *v.* Knotts,[3] are open to the same objections.

Judgment for the defendant.[4]

[1] 6 H. & N. 728. [2] L. R. 15 Eq. 311, 8 Ch. 866. [3] 10 Rich. 543.

[4] Hyland *v.* Habich, 150 Mass. 112 (*semble*), *Accord.*

Gay *v.* Ward, 67 Conn. 147, 156; Rapp *v.* Phœnix Co., 113 Ill. 390, 400-401, *Contra.*

See also Shackamaxon Bank *v.* Yard, 143 Pa. 129, 137. — Ed.

NATIONAL EAGLE BANK *v.* H. A. HUNT, ADMINISTRATOR.

IN THE SUPREME COURT, RHODE ISLAND, FEBRUARY 11, 1886.

[*Reported in* 16 *Rhode Island Reports*, 148.]

COVENANT. On demurrers to the pleas.

February 11, 1888. MATTESON, J. This is an action of covenant upon two sealed instruments, made, executed, and delivered to the plaintiff by Sturgis P. Carpenter, the defendant's intestate.

The first[1] count in the declaration sets forth that on the 25th day of November, 1882, the said Sturgis P. Carpenter, by his certain deed-poll, or agreement in writing of that date, made and signed by him and sealed with his seal, after reciting therein that said plaintiff had theretofore at his request discounted trade or business paper for his son, Clarence H. Carpenter, and might from time to time thereafter discount trade or business paper for said Clarence, or for his son, Frank F. Carpenter, guaranteed to said plaintiff the payment as and when it matured of all such trade or business paper of said Clarence or of said Frank that had been or might be discounted by the plaintiff, until such time as he, said Sturgis, should notify the plaintiff of his intention to terminate said guaranty, and thereby waived demand and notice of non-payment thereof; that said Sturgis never notified the plaintiff of his intention to terminate said guarantee, and that afterwards, on the 31st day of March, 1884, the plaintiff, upon the faith of and relying upon said guarantee, discounted for said Clarence his, said Clarence's, note of that date for $2,500, payable four months after date at bank, to the order of said Sturgis, which note had theretofore been indorsed by said Sturgis, and paid over to said Clarence the net proceeds of the discount of said note; that afterwards, when said note became due and payable, to wit, on the 2d day of August, 1884, payment of it was demanded at bank, but the said Clarence did not pay and never has paid it or any part of it; of all which the defendant had due notice, and thereby became liable to pay the plaintiff the amount of said note on demand.

The defendant's third, fourth, and fifth pleas set forth in varying terms, in substance, that prior to the maturity of said note the said Sturgis P. Carpenter died; that the plaintiff had full notice of his death at the time of his decease, and that said guarantee was thereby terminated and revoked as to all subsequent transactions.

To these pleas the plaintiff has demurred.

Guarantees have been divided into two classes: one where the consideration is entire, that is, where it passes wholly at one time; the other, where it passes at different times, and is, therefore, separable or divisible. The former are not revocable by the guarantor, and are not terminated by his death and notice of that fact. Calvert *v.* Gordon,[2]

[1] Only so much of the opinion is given as relates to this count. — ED.

[2] 3 Man. & Ry. 124, 128.

Green *v.* Young;[1] Moore *v.* Wallis;[2] Royal Insurance Co. *v.* Davies;[3] Lloyds *v.* Harper; Rapp *v.* Phœnix Insurance Co.[4] The latter, on the contrary, may be revoked as to subsequent transactions by the guarantor, upon notice to that effect, and are determined by his death and notice of that event. Offord *v.* Davies;[5] Jordan *v.* Dobbins; Coulthart *v.* Clementson; Rapp *v.* Phœnix Insurance Co.; Menard *v.* Scudder.[6]

The distinction between these two classes of guarantees is well illustrated by Lush, Lord Justice, in Lloyds *v.* Harper. "An instance of the first," he remarks, "is where a person enters into a guarantee that, in consideration of the lessor granting a lease to a third person, he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that of necessity runs on throughout the duration of the lease. The lease was intended to be a guaranteed lease, and it is impossible to say that the guarantor could put an end to the guarantee at his pleasure, or that it could be put an end to by his death, contrary to the manifest intention of the parties. Another illustration of it is found in . . . Calvert *v.* Gordon,[7] which is one of a precisely similar kind. There the defendant, in consideration that the plaintiff would take into his service a given individual as collector and clerk in a responsible position, guaranteed that he would be answerable for his fidelity as long as he continued in that service. It was held, and, as I think, rightly, by the Court of Queen's Bench, that that guarantee could not be put an end to as long as the service continued. The consideration there was, admitting the young man into the service of the plaintiff in that capacity, and, that being done, it was to be a guaranteed service as long as he remained there. The guarantee, therefore, necessarily continued until the service ended.

"Instances of the second class are more familiar. They are where a guarantee is given to secure the balance of a running account at a banker's, or the balance of a money account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee. He remains answerable for all the advances made or all the goods supplied upon his guarantee before the notice to determine it is given; but at any time he may say, 'I put a stop to this; I do not intend to be answerable any longer; therefore do not make any more advances or supply any more goods upon my guarantee.' As at present advised, I think it quite competent for a person to do that when, as I have said, the guarantee is for advances to be made or goods to be supplied, and where nothing is said in the guarantee about how long it is to endure.[8] In that case, as

[1] 8 Me. 14, 15, 16.
[2] 8 Ala. 458, 463.
[3] 40 Iowa, 469, 471.
[4] 113 Ill. 390, 394, 395.
[5] 12 C. B. N. S. 748, 756, 757.
[6] 7 La. Ann. 385, 391, 392.
[7] 3 Man. & Ry. 124.
[8] Jeudevine *v.* Rose, 36 Mich. 54, *Accord.* — Ed.

at present advised, I cannot entertain a doubt that the judgment of Mr. Justice Bowen, in Coulthart *v.* Clementson, is perfectly right, that notice of the death of the guarantor is a notice to terminate the guarantee, and has the same effect as a notice given in the lifetime of the guarantor that he would put an end to it."

The only case in which a different doctrine from that above expressed with reference to the second class of guarantees has been held is Bradbury *v.* Morgan. In that case, however, as remarked by Lord Romilly in Harris *v.* Fawcett,[1] the plea did not aver that the plaintiffs had notice of the death of the guarantor before they supplied the goods, although the court did not base its decision upon the want of such notice. The authority of Bradbury *v.* Morgan has, however, been questioned; Harris *v.* Fawcett; and was not regarded in Coulthart *v.* Clementson, a later case, in which a contrary decision was made.

The guarantees in the case at bar come within the second class above considered. They were, therefore, upon the authorities cited, terminated by the death of the guarantor and notice of it to the plaintiff, as to all subsequent transactions.[2] As, however, the note described in the declaration had been discounted, and the net proceeds had been paid to the maker prior to the death of the guarantor, the plaintiff would have been entitled to recover but for the fact, set up in the pleas, that after notice of the death of the guarantor it extended the time of payment for a further period by taking a new note from the principal debtor and receiving the interest thereon in advance, without the consent of the defendant, and without any reservation of his right assented to by the principal, to insist upon immediate payment by the principal, and, in default of such payment, to pay the debt himself, and proceed at once against the principal. That such action on the part of the plaintiff was sufficient to release the estate of the guarantor, and the defendant as his representative, from liability, is too well established to need the citation of authority. *Demurrers overruled.*

[1] L. R. 15 Eq. 311, 313.

[2] Gay *v.* Ward, 67 Conn. 147; Slagle *v.* Anderson, 1 Mona. (Pa.) 30; Kernochan *v.* Murray, 111 N. Y. 306, 309, *Accord.*

See Hecht *v.* Weaver, 34 Fed. R. 111.— Ed.

Natl Bk v Hunt Admr

Δ signed a guaranty under seal to Bk Π to be liable & to guarantee payment of all business had ~~guaranteed~~ discounted by Π for some, & guaranty only to be revoked by written notice. Π discounted note of son, on which Δ was indorser for accomodation. Then Δ died, & Π extended time of note. Π took new note now tries to hold Δ on the guaranty, having had notice of death.

et gave judgment for ~~Δ~~ Guarantee here. Was only an offer, accepted by each transaction of discounting. Δ was discharged on note by extension of credit. Guarantee wont hold Δ because it was revoked by death, since it was not a completed contract.

Beckett v Addyman

Δ & one W might owe jointly On a joint & guarantee performance
several obligation W might die & all parties knew about
it, & then π's made public advances to P, & now sue
survivor to recover.

Held π entitled to recover, death of co-
surety cannot affect π's legal rt against sur-
vivor, especially since this is a joint & several
obligation. π has done nothing inequitable, &
there is nothing wrong about holding Δ, especially
when he could have withdrawn, had he avoided.

BECKETT & CO. *v.* ADDYMAN.

IN THE COURT OF APPEAL, JULY 3, 1882.

[*Reported in* 9 *Queen's Bench Division*, 783.]

THE plaintiffs sued to recover a sum of £250, the limit of a joint and several continuing guarantee, in the form of a bond, by the defendant and another surety, named Wright, for advances by the plaintiffs as bankers to Grayson and Hardisty, who had an account with them.

Wright, the defendant's co-surety, died on the 22d of March, 1872, and both the plaintiffs and defendant had notice of the death at the same time.

The plaintiffs continued the account after Wright's death, and made further advances to Grayson and Hardisty, and there being a larger balance due on the account to the plaintiffs than the limit of £250, it was to recover the latter sum that the action was brought.

The statement of defence alleged circumstances connected with Wright's testamentary dispositions calculated to bring the case within the authority of the recent decision of Coulthart *v.* Clementson, and to this statement of defence the plaintiffs demurred.[1]

LORD COLERIDGE, C. J. The defendant is clearly liable upon the terms of the instrument, at least by the principles of the common law, but it is contended that there is some principle whereby the persons guaranteed who have done nothing are not entitled to sue upon the bond of which the defendant was obligor; for the other person who as a surety became obligor is now dead. It is said that some ground for relief exists in equity, and cases in equity may be cited in which it has been decided that relief ought to be granted, because the creditors had done some act behind the back of the surety. But no ground like that exists in the present case. I think it must be taken that by the terms of the bond the death of one of the sureties was to some extent contemplated, and that it was not intended to discharge the other. It is probable that the defendant could have terminated his liability by notice; for it seems to be clear that in the case of a continuing guarantee for goods to be supplied or money to be advanced, it is in the power of the guarantor to determine his liability; but if the surety takes no steps he remains liable. In the present case it is plain that the creditors can recover on the bond. The judgment of the court below must be affirmed.

BRETT, L. J. This bond must be construed as a joint and several obligation. At common law it must be deemed to consist of separate deeds, and the defendant is *prima facie* separately liable. What are

[1] The statement of the case is taken from the opinion of FIELD, J., in the Queen's Bench Division. — ED.

the defendant's rights at law against the plaintiffs, and what are the plaintiffs' rights against him? The defendant might have given notice to determine his liability; but no notice has ever been given. At law the defendant is clearly liable until he has given notice. Then, has the defendant any relief in equity? The cases cited during the argument do not show that any equity exists in his favor. It has been contended that the defendant would have an equity against his co-obligor. That may be true, but it does not follow that the liability to the obligees of the bond would likewise determine. It has been argued that the liability of the estate of the co-obligor has determined, and therefore that the liability of the defendant is at an end. I will not now decide whether the estate of the co-obligor is liable; but assuredly the determination of that liability can in no case discharge the defendant. To hold that the defendant is discharged under the circumstances disclosed in the pleadings would be tantamount to striking out the obligation contained in the bond. I can see no equity against the plaintiffs. As they have done nothing, no equity exists against them, and they may recover upon their legal right.

COTTON, L. J. At law the defendant is clearly liable. But it is contended that, as the plaintiffs had notice of the co-obligor's will and of the appointment of the executors, the defendant is discharged. It is doubtful whether mere notice of the death and of the will could put an end to the liability of the estate; but I will assume that it did. How can that circumstance alter the position of the co-surety? If the creditor deprives the surety of his rights, that may put an end to his liability; but here the plaintiffs have done no act to discharge the defendant; in my opinion the defendant has no equity against the plaintiffs. The decision in the Queen's Bench Division was right.

Judgment affirmed.[1]

[1] In Ashby *v.* Day, 34 W. R. 312, the Court of Appeal expressly refrained from giving a decision as to whether the death of one joint guarantor (not joint and several) *ipso facto* determined the guarantee. BACON, V. C., had expressed the opinion in the Chancery Division that the liability of the survivor was not affected by the death of his co-guarantor. The guarantee in this case was not under seal, but this fact seems not to have influenced the judges. In Fennell *v.* McGuire, 21 Up. Can. C. P. 134, two persons gave a joint (not joint and several) parol guarantee, that is, a joint offer of payment for goods that A. should from time to time sell to B. Goods were sold by A. to B. after the death of one of the joint offerors. The other was nevertheless held liable as a guarantor — ED.

L. K. HUNT and Another, Respondents, v. E. ROBERTS, Appellant.

In the Court of Appeals, June, 1871.

[*Reported in* 45 *New York Reports*, 691.]

Rapallo, J.[1] By a contract dated August 12, 1861, the plaintiffs agreed with Crossley to do the carpenters' work on the houses for the sum of $2,625, and to complete the work on or before the 15th of October, 1861; Crossley was to furnish the materials. The defendant guaranteed the fulfilment of the contract on the part of Crossley.

The work was not finished on the 15th of October, and between that day and the 1st of November the defendant gave notice to the plaintiffs that if they did not complete the work before the 1st of November, 1861, he would not be responsible as guarantor after that day. The plaintiffs, nevertheless, went on with the work until June, 1862, and have recovered in this action the contract price of the work up to that time.

It appears from the findings of the referee, that the delay in completing the work was owing to the fault of Crossley in furnishing the materials and preparing the houses. And, further, that the defendant had, under a contract with Henry Day, the owner of the lots, assumed the obligations of Crossley in those respects, so that the default was in fact that of the defendant. What the arrangements were between Crossley and the defendant does not appear.

The defence cannot be sustained on the ground of any breach of the contract on the part of the plaintiffs, but rests wholly upon the effect of the defendant's notice that he would not be bound as guarantor after the 1st of November.

By the terms of the original contract, the work was to have been completed on the 15th of October. If not performed at this time, the defendant, had he not interfered in the transaction, or consented to an extension of the time, would have been entitled to have the matter closed. If the delay had been owing to the default of the plaintiffs, the defendant would have been discharged. If it was caused by Crossley, he had been guilty of a breach, and the defendant would have been entitled to insist upon the contract being terminated, and, on such termination, would have been liable as guarantor for the work done up to that time, and for the damages sustained by the plaintiffs in not being allowed to complete the job.

The effect of the notice was to extend the time for completion, as far as the guarantee was concerned, to the 1st of November. We think that the extension left the parties in the same position on the 1st of November in which they would otherwise have been on the 15th of

[1] Only the opinion of the court is given, and that too somewhat abridged. — Ed.

October, and that it did not operate as an extension of the guarantee indefinitely to such time as might be necessary to complete the work, but that the defendant had the right to insist that his liability, as guarantor, should be limited to the debt and damages which the plaintiffs were entitled to claim as of the date specified in his notice.

If the defence rested upon the allegation, that the plaintiffs had failed to perform their part of the contract, or that the contract had been varied, the facts found by the referee would have been abundant answers to those defences. But such is not the nature of the defence. It is, that after the contract had been broken, the defendant, in his character of surety, insisted that the plaintiffs should not go on and add to his liability as guarantor, but that, if they continued, they should look to the principal alone for all work done after that time. If they did not think proper to continue on those terms, they should have stopped work, and would have been entitled to recover of the defendant what they had earned up to that time and their damages for not being allowed to complete the job.

The learned referee, in substance, denied all effect to the notice given by the defendant, and seems to have held that he could not thereby fix the time as of which the amount of his liability should be ascertained. There is authority for the proposition, that a surety cannot, before breach, by his own act terminate a subsisting suretyship for a third person, so as to exempt himself from liability for future defaults of his principal, Hough *v.* Warr;[1] Calvert *v.* Gordon;[2] Gordon *v.* Calvert;[3] Calvert *v.* Gordon;[4] although an agreement to guarantee obligations to be incurred may be revoked before it is acted upon. (Offord *v.* Davies;[5] Agawam Bank *v.* Strever.[6]) Without now determining how far a surety can, before a breach of the engagement of his principal, protect himself from future defaults, we are clearly of opinion that, after a breach which will justify a termination of the contract, the surety has the right to require that the contract with the principal be terminated, and the claim against the surety confined to the damages then recoverable.

Judgment reversed and new trial ordered, costs to abide the event.[7]

[1] 1 Car. & P. 151.
[2] 1 M. & Ry. 497; s. c. 7 B. & C. 809.
[3] 2 Sim. 253; s. c. 4 Russ. 581.
[4] 3 M. & Ry. 124.
[5] 31 L. J. C. B. 319.
[6] 18 N. Y. 513, 514.
[7] Dwelling Co. *v.* Johnston, 90 Mich. 170, *Accord.* — Ed.

Hunt v Roberts

Δ guaranteed fulfillment of contract of Crossley, who was to furnish materials for a house by Oct 15. Δ decided not, & Π's then served notice that if work was not completed before Nov 1, he would not be responsible as guarantor thereafter. Work was not completed; Π's went on & finished contract & sue to recover full amt of damages sustained.

Ct held that after a breach which justified a termination of contract, Δ had rt to require that the contract be terminated, & the claim of Δ be confined to damages then recoverable.

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